82-6732

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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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DAVID FELIX, Appellant,

- against -

PEOPLE OF THE STATE OF NEW YORK, Appellees.

- - - - - - - - -

On Appeal From the Court of Appeals of New York

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JURISDICTIONAL STATEMENT

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ERRATUM

RE: Felix v. New York

No: 82-6732

Jurisdictional Statement

Page 5, line 19 -- "lowest **punishable** sentence"
should read "lowest **permissible** sentence."

Page 7, line 7 -- "impermissibly **punishing** sentence"
should read "impermissibly **premising** sentence."

Page 7, line 8 -- "charged **them** rather"
should read "charged rather."

QUESTION PRESENTED

Whether New York Penal Law §70.02(5) violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States in that it required that the sentence imposed upon David Felix be determined be reference to unsustained charges in the indictment rather than by the crime for which he was convicted and in that it created a mandatory presumption of guilt solely upon the basis of an unsustained charge.

PARTIES BELOW

The only parties in the Court of Appeals of the State of New York were David Felix and the People of the State of New York.

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OPINIONS BELOW

The Opinion of the New York Court of Appeals, dated February 15, 1983, is reported as People v. Felix, 58 NY2d 12 (1983). The text of the Opinion is set out in Appendix A at A.1-14.

The Opinion of the New York Supreme Court, Appellate Division, First Department, dated March 16, 1982, is reported as People v. Felix, 87 AD2d 529 (1982). The text of the Opinion is set out in Appendix B at A.15-39.

The Opinion of the Supreme Court, Trial Term, New York County (Fitzer, J.), dated August 28, 1979, was not officially reported. The written decision is set out in Appendix C at A.40-42.

JURISDICTION

This is an appeal from a final judgment of the New York Court of Appeals filed February 15, 1983, which affirmed Appellant's conviction and thereby upheld New York Penal Law §70.02(5) and its application against federal claims of unconstitutionality. Rehearing was not sought. Jurisdiction lies in this Court pursuant to U.S.C. §§1257(2) and (3) 28. Since this appeal challenges the constitutionality of a state statute, and since the Attorney General of the State of New York chose not to be a party below, 28 U.S.C. §2403 applies. A copy of the Notice of Appeal filed in the New York Court of Appeals is attached hereto as Appendix E at A.59.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part that:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law.

STATUTORY PROVISIONS INVOLVED

Penal Law §70.02(5) provides that:

> (a) Except as provided in paragraph (b) of this section, where a plea of guilty to a class D violent felony offense is entered pursuant to section 220.10 or 220.30 of the criminal procedure law in satisfaction of an indictment charging the defendant with an armed felony, as defined in subdivision forty-one of section 1.20 of the

criminal procedure law, the court must impose an indeterminate sentence of imprisonment pursuant to section 70.00.

(b) In any case in which the provisions of paragraph (a) hereof or the provisions of subparagraph (ii) of paragraph (c) of subdivision two of this section apply, the court may impose a sentence other than an indeterminate sentence of imprisonment, or a definite sentence of imprisonment for a period of no less than one year, if it finds that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the defendant's commission of an armed felony.

(c) The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) hereof, and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that an indeterminate sentence of imprisonment should not be imposed pursuant to the provisions of such paragraph (b), it shall make a statement on the record of the facts and circumstances upon which such determination is based. . . .

Criminal Procedure Law §1.20(41) provides that:

"Armed felony" means any violent felony offense . . . that includes as an element either:

(a) possession, being armed with or causing serious physical injury by means of a deadly weapon, if the weapon is a loaded weapon from which a shot, readily capable of producing death or other serious injury may be discharged; or

(b) display of what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

STATEMENT OF THE CASE

Facts

DAVID FELIX, Appellant herein, was indicted, inter alia, for robbery in the first degree (displaying a knife) and robbery in the second degree as an armed felony (displaying an imitation pistol)[1] (New York Penal Law §§160.15 and 160.10 respectively). (Hereinafter "PL §___"). All charges arose out of a single incident in which David Felix allegedly took a "Grateful Dead" button from Sam Rohm while displaying both a knife and an imitation pistol, On October 19, 1979, Appellant pleaded guilty to attempted robbery in the second degree, a simple class "D" violent felony under that count of the indictment which charged him with robbery in the first degree (displaying a knife). (Appendix D at A.50.) During his plea allocution, Appellant admitted that he had forcibly taken a Grateful Dead button from the complainant and that during the commission of that crime he displayed a knife. Appellant neither admitted nor was he querried concerning his possession of the imitation pistol, or its use during the robbery. (Appendix D at A.57-58.) Robbery commited while displaying a knife is not an armed felony.

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[1] An armed felony is defined as a violent felony committed with what is or what appears to be a firearm. Criminal Procedure Law §1.20(41). Robbery in the second degree was the only armed felony count in the indictment.

The court informed Appellant that since the indictment "charges an armed violent felony in the second count, even though your plea is to a simple violent felony," it would be constrained by operation of PL §70.02(5) to impose a sentence of at least one to three years incarceration in state prison (Appendix D at A.53-54). Since Appellant was originally charged with an indictment containing an armed felony, he could only escape this mandatory minimum period of incarceration if he proved that his conduct did not "rise to that of an armed felon." (Appendix C at A.42.) But for PL §70.02(5), Appellant, upon his conviction for the simple violent "D" felony, would have been eligible to receive a sentence of one year or less in a City correctional facility, a sentence of probation, or a conditional or even unconditional discharge. By operation of PL §70.02(5), however, these lesser sentencing alternatives were foreclosed. Appellant was sentenced to one to three years in state prison the lowest punishable sentence under PL §70.02(5). (Appendix D at A.48.)

Appellant moved the trial court to declare PL §70.02(5) violative of due process of law (U.S. Const. Amend. XIV; NY Const. Art. I §6). The trial court denied the motion in a written decision and order. (Appendix C at 40-42.) On appeal to the Appellate Division of the Supreme Court, Appellant again challenged the constitutionality of the statute upon federal constitutional

grounds. A sharply divided Appellate Division affirmed the judgment. (Appendix B at A.15-39.) Appellant thereupon appealed to the New York Court of Appeals which held, with one dissent, that PL §70.02(5) did not violate the due process clause of the State and Federal Constitutions. (Appendix A at A.1-14.)

WHEN AND HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Appellant raised, argued and preserved the federal constitutional claim at his first and at every subsequent opportunity, and the New York Court of Appeals expressly ruled upon the federal question presented (Appendices A-D).

1) At the earliest possible stage of the relevant proceedings, Appellant raised the claim that PL §70.02(5) violated the Fourteenth Amendment of the United States Constitution. In a memorandum of law submitted to the trial court prior to sentencing, Appellant argued that the sentencing restrictions of PL §70.02(5)(a) directly contravene due process as guaranteed by both the Federal and State Constitutions because they preclude lenient sentencing to defendants who plead down from an indictment charging an armed felony, notwithstanding the fact that no elements of the armed felony count have been admitted or proven.

The sentencing court held that the challenged statute did not violate due process, because under PL §70.02(5)(b)

a defendant who can show that his conduct did not "rise to that of an armed felon" is "granted a reprieve from the harsher sentencing guidelines." (Appendix C at A.42).

2) Upon appeal to the Appellate Division of the Supreme Court, Appellant again argued that PL §70.02(5) violated his federal constitutional right to due process by impermissibly punishing sentencing upon the crime charged them rather than the crime proven, thereby imposing sentence upon criterion which is neither relevant nor reliable. Gardner v. Florida, 430 U.S. 349, 358 (1977); Williams v. New York, 337 U.S. 241, 252 n. 18 (1949); Townsend v. Burke, 334 U.S. 736, 740-741 (1948). Appellant argued that PL §70.02(5) also offends due process of law by creating the untenable presumption that one accused of an armed felony who pleads only to a simple felony has, in fact, committed the more serious crime "involving the use of a firearm" and is deserving of enhanced punishment. Tot v. United States, 319 U.S. 463, 469 (1943); McFarland v. American Sugar Refinery Co., 241 U.S. 79 (1916). The statute then compounds this violation of federal due process protections by placing on the accused the burden of extricating himself from the enhanced penalty. Specht v. Patterson, 386 U.S. 547 (1967).

Appellant's sentence was upheld by a sharply divided Appellate Division. Two justices voted to affirm Appellant's conviction without reaching the constitutional issue, holding that, in any event, the sentence imposed was "appropriate." (Appendix B at A.17). The three

remaining justices believed that the constitutional issue could not be avoided. Of those, two found PL §70.02(5) unconstitutional because "its effect is to impose increased punishment on the basis of an act charged but unproven." (Appendix B at A.34).

3) On appeal to the New York Court of Appeals, Appellant again raised the federal constitutional claims. The Court of Appeals held that the constitutional question had to be answered, but went on to find, with one judge dissenting, that "the subdivisions's prescription of the minimum sentence to be imposed absent a finding of mitigating circumstances does not violate the due process clause of either the Federal or the State Constitutions." (Appendix A at A.3). The Court concluded that the "probability of wrongdoing" was sufficiently established by the grand jury's return of an armed felony indictment "to justify such burden shifting as the subdivision involves." (Appendix A at A.12).

Judge Jones, in dissent, stated that "constitutionally guaranteed due process is denied when the scheme of sentencing is to any significant extent made to turn on a charge set forth in the accusatory instrument but which has been neither proved by the People nor admitted by the defendant." (Appendix A at A.12-13.)

WHY THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented by this appeal is substantial because the decision below conflicts with the holdings and rationale of several significant decisions of this Court; because the failure of the New York Court of Appeals to follow the rulings of this Court has condemned Appellant, David Felix, to suffer a grievous loss of liberty; and because the question of how much process is due at sentencing continually recurs and requires this Court's attention.

The issue herein is whether, consistent with due process, a criminal statute may limit the ordinary sentencing discretion of a court and mandate that a defendant be subjected to enhanced punishment solely on the basis of the defendant's inability to rebut a mandatory presumption of guilt predicated on an unsustained charge in the indictment. Where a defendant has been charged with an armed felony but enters a plea to a simple "D" violent felony, New York Penal Law §70.02(5) [hereinafter referred to as PL §70.02(5)] precludes the sentencing court from considering the past history and character of the offender and requires the sentencing court to presume that the defendant committed the armed felony. Unless the defendant can rebut this presumption he must, at a minimum, be sentenced to one to three years in state prison. But for PL §70.02(5), the same defendant could receive a lesser jail term, a sentence of probation, or a conditional or unconditional discharge. Penal Law

§70.02(5) thus violates due process of law because it mandates imposition of increased punishment on the basis of an act charged in the indictment, but unproven.

The Federal Constitution precludes reliance upon improper or inaccurate information in making the sentencing determination. United States v. Tucker, 404 U.S. 443, 446-447 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948). See also, e.g., Dorszynski v. United States, 418 U.S. 424, 431 n.7 (1974); United States v. Harris, 558 F.2d 366, 373 (7th Cir. 1977); McGee v. United States, 462 F.2d 243, 245 n.2 (2d Cir. 1972). In United States v. Espinoza, 481 F.2d 553, 555 (5th Cir. 1973), the court stated:

> Implicit in the Court's holding in Tucker is the principle that despite the broad discretion left to the trial judge in assessing background information for sentencing purposes, see Williams v. New York . . . a defendant retains the right not to be sentenced on the basis of invalid premises.

A grand jury indictment is, as a matter of law, neither a relevant nor a reliable indicia of guilt. Indeed, as this Court stated in Tot v. United States, 319 U.S. 463, 466 (1943), "[a]n indictment charges the defendant with action or failure to act contrary to the law's command. It does not constitute proof of the commission of the offense." See, also, United States v. Wortman, 26 F.R.D. 183, 204 (1960). Therefore, an indictment cannot serve as the sole legislatively mandated premise for an entire sentencing structure. Tucker, 404 U.S. at 446-447; Townsend, 334 U.S. at 741 .

Courts have held that a sentencing judge may, in the exercise of his broad discretion, consider the charge for which the defendant was indicted, but only in conjunction with all other relevant facts concerning the nature of the crime and the nature of the offender.[2] No court has held that a legislature may decree that after a plea to a lesser crime, a higher unsustained charge, and that alone, must be the basis of the court's sentencing determination. Certainly no court has held that a legislature may, on the basis of an unsustained charge, exclude from consideration the usual sentencing factors concerning a particular defendant's background and history. In fact, the failure to exercise individualized discretion has itself been held to be grounds for vacation of the sentence imposed. See, United States v. Harris, 558 F.2d at 372 n.10, and cases cited therein.

While a legislature may establish sentencing guidelines, it is inconsistent with due process for those guidelines to be premised upon an unconstitutional criterion such as an unsustained charge in the indictment. As Judge Jones stated in his dissent below, "constitutionally guaranteed due process is denied when the scheme of sentencing is to any significant extent made to turn on a

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[2] See, e.g., Billeteri v. United States Board of Parole, 541 F.2d 938, 944 (2d Cir. 1976); United States v. Needles, 472 F.2d 652 (2d Cir. 1973).

charge set forth in the accusatory instrument but which has been neither proved by the People not admitted by the defendant." (Appendix A at 12-13.)

Assuming arguendo that it were possible for a statute to require that an unsustained charge in the indictment determine the sentencing procedure, PL §70.02(5) would still raise substantial constitutional questions because it creates a mandatory presumption of guilt of a crime not established by the conviction and shifts to the defendant the burden of disproving an element of an unsustained charge.

The Federal Constitution forbids a mandatory presumption which shifts the burden of persuasion by requiring the defendant affirmatively to establish the negative of an element of the offense. Mullaney v. Wilbur, 421 U.S. 684, 700-701 (1975). See also, McInerney v. Berman, 621 F.2d 20, 23 (1st Cir. 1980). The effect of PL §70.02(5) is to place the burdens of going forward and of persuasion on the defendant because, absenct his ability to establish any mitigating circumstances, the court cannot consider a lesser sentence and must impose a state prison term. Being armed is an element of the crime of robbery as an armed felony, New York Criminal Procedure Law §1.20(41), yet PL §70.02(5) places upon the defendant the burden of demonstrating, in the words of the sentencing judge, "that his conduct does not rise to that of an armed felon." (Appendix C at A. 42.) Such a burden shifting presumption established by PL §70.02(5) is invalid on its face, because it violates the fundamental

command of due process that "no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt." Speiser v. Randall, 357 U.S. 513, 526 (1958). See also, In re Winship, 397 U.S. 358, 364 (1970).

While the New York Court of Appeals did not specify upon whom PL §70.02(5) placed the burden of persuasion, it did hold that the "establishment of an ameliorative factor will require that defendant come forward with proof." (Appendix A at A. 12.) Even if the statute only shifts the burden of production to the defendant, following the satisfaction of which the ultimate burden of persuasion returned to the prosection, due process would still be violated.

The Court of Appeals held that the presumption of guilt of an armed felony which is created by PL §70.02(5) was justified because:

> In many cases . . . knowledge of the facts necessary to establish a basis for a lesser sentence will be peculiar to defendant, and in every case, by the Grand Jury's return of an armed felony indictment which must be based upon reasonable cause (CPL 190.65), the probability of wrongdoing is sufficiently present to justify such burden shifting as the subdivision involves. (Appendix A at A. 12.)

This holding is contrary to every decision by this Court concerning the necessary basis of a presumption in criminal procedure. In Tot, 319 U.S. at 467-469, this Court specifically rejected the justification proferred by the New York Court of Appeals in the instant case, holding that no matter how much more "convenient" it may be for

the defendant to produce evidence of the ultimate fact, a statutory presumption cannot be sustained unless there is a rational connection between the fact proved and the fact presumed.

The same argument of relative convenience made here, was also made by the government in Leary v. United States, 395 U.S. 6, 45 (1969). This Court rejected that approach, and made explicit what had been implicit in Tot: the test of comparative convenience in the production of evidence has been abandoned. Thus a defendant's greater knowledge cannot validate the presumption created by PL §70.02(5).

This Court held in County Court of Ulster County v. Allen, 442 U.S. 140, 174 (1979), that a statutorily created presumption which shifted the burden of production to the defendant would pass constitutional muster only if it is "more likely than not" that the ultimate fact flows from the presumed fact. In Tot, 319 U.S. at 469, this Court held, as a matter of law, that there is no rational connection between the basic fact of an indictment, and the presumed fact of guilt. As a matter of law a legislature may not "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." Tot, 319 U.S. at 469.

The New York Court of Appeals sustained this extraordinary procedure[3] by misplaced reliance on this Court's

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[3] Appellant has been unable to discover any parallel sentencing statute in federal or state criminal law.

decision in Williams v. New York, 337 U.S. 241, 251 (1949). This Court's approval in Williams of flexible procedures in sentencing was explicitly grounded in "an increase in the discretionary powers exercised in fixing punishments." Williams, 337 U.S. at 249. This Court stated:

> A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant -- if not essential --to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.
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> * * *
>
> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. People v. Johnson, 252 N.Y. 387, 392, 169 N.E. 619. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. Williams, 337 U.S. at 247.

The Williams decision was intended to assure that in passing sentence "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." U.S. v. Tucker, 404 U.S. at 446.

To sustain PL §70.02(5) by reliance on Williams, therefore, is particularly unjustifiable. Penal Law §70.02(5) limits the scope of inquiry by directing the court to make very particularized findings of fact not

established by the conviction and going only to the manner in which the crime was committed. The statute precludes the court from considering any information concerning the "past life and habits of a particular offender." Williams, 337 U.S. at 247.

Additionally, a further explanation of the holding in Williams is called for in light of this Court's recent decision in Gardner v Florida, 430 U.S. 349 (1977), the plurality opinion of which noted "that the sentencing process, as well as the trial itself must satisfy the requirements of the Due Process Clause." Gardner, 430 U.S. at 358, citing Mempa v. Rhay, 389 U.S. 128 (1967), and Specht v. Patterson, 386 U.S. 605 (1967). While this Court specifically noted that sentencing does not necessarily "implicate the entire panoply of criminal trial procedural rights," Gardner, 430 U.S. at 358, n. 9, it is clear from the Court's reliance upon the decision in Specht, supra, that when specific factual determinations are introduced into the sentencing procedure, the Constitution requires more rigorous procedural safeguards than those provided by PL § 70.02(5).[4]

In holding that due process protections apply at a sentencing which involves a determination of factual allegations not established by the conviction, this Court

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[4] See, Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev. 733, 761 (1980).

stated that such specific factual determinations constitute

> . . . a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirement of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial. . . . Specht, 386 U.S. at 609-610, quoting U.S. ex. rel. Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966).

Thus, when a statute requires that facts not established by the conviction be considered in order to determine what sentence shall be imposed, a defendant is entitled to all the protections guaranteed by due process. Determination of whether a defendant who has pleaded only to a violent unarmed felony has in fact committed the crime while armed is "directly controlled by Specht because this inquiry concerns not only a 'distinct issue,' but the kind of issue traditionally thought to involve a new criminal charge." Schulhofer, supra, 128 U. Pa. L. Rev. at 762. Whether or not Appellant was "armed" is an element of the distinct charge of robbery as an armed felony, and had there been a trial there is no doubt that the burden to prove this element would have been on the prosecution. See, Mullaney v. Wilbur, 421 U.S. 684 (1975).

There was nothing in the plea herein which could be construed as an admission by Appellant that he was armed. Appellant pleaded guilty to robbery in the second degree under the first count of the indictment which charged him with robbery in the first degree predicated upon the use of a knife. The use or threatened use of a knife in a robbery does not constitute an armed felony. New York Criminal Procedure Law §1.20(41). Appellant thus pleaded to a crime which is not even a species of an armed felony. (Appendix B at A. 34.) Moreover, at the plea colloquy Appellant made no admissions and was not even asked by the Court or the prosecution whether he was armed with a firearm during the commission of the crime. (Appendix D at A. 49-58.)

The inquiry mandated by PL §70.02(5) concerning "whether the defendant's conduct rose to that of an armed felon," (Appendix C at A. 42.), therefore, required a distinct fact-finding procedure concerning an issue not established by the conviction. In such a procedure the less formal due process requirements permitted by Williams are inapplicable, and all relevant due process rights required by Specht must be accorded. Penal Law §70.02(5) fails to provide even minimal procedural safeguards. Through PL §70.02(5) the State is able to extract a penalty for an armed felony without ever obtaining a conviction; it may punish by mere accusation without moving forward with the requisite proof of all essential elements of the offense. This offends due process.

CONCLUSION

For the reasons stated herein this Court should note probable jurisdiction.

Respectfully submitted,

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APPENDIX A

Decision of the New York
Court of Appeals

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v DAVID FELIX, Appellant.

Argued January 7, 1982; decided February 18, 1982.

SUMMARY

APPEAL, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered March 16, 1982, which affirmed a judgment of the Supreme Court (NORMAN B. FITZER, J.), rendered in New York County, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree.

Defendant, who while allegedly displaying both a knife and what appeared to be a pistol, stole a "Grateful Dead" button from another passenger on a subway train, pleaded guilty to attempted robbery in the second degree, a class D violent felony offense, in full satisfaction of an indictment charging an armed felony, including counts of robbery in the first and second degrees, and the court imposed a sentence of imprisonment for a term of one to three years, the shortest indeterminate term of imprisonment permissible for the bargained for offense under section 70.02 (subd 5, par [b]) of the Penal Law, explaining that an application for a lesser sentence due to mitigating circumstances would be considered. At a later date, the court denied the application for a reduced sentence on the ground that the circumstances did not bear on the matter in which the crime was committed. After a challenge to the constitutionality of the statute on the ground that it violated due process, the Appellate Division affirmed the sentence.

The Court of Appeals affirmed, holding, in an opinion by Judge MEYER that there is no due process infirmity under either the Federal or the State Constitution in the requirement of subdivision 5 of section 70.02 of the Penal Law that a defendant who has been charged with an armed felony and permitted in satisfaction of the indictment to plead guilty to a class D violent felony must receive an indeterminate sentence of one to three years unless the court finds that factors specified in the section warrant imposition of less than an indeterminate sentence.

People v Felix, 87 AD2d 529, affirmed.

HEADNOTE

Crimes — Sentence — Violent Felony Offense

There is no due process infirmity under either the Federal or the State Constitution in the requirement of subdivision 5 of section 70.02 of the Penal Law that a defendant who has been charged with an armed felony and permitted in satisfaction of the indictment to plead guilty to a class D violent felony must receive an indeterminate sentence of one to three years unless the court finds that factors specified in the section warrant imposition of less than an indeterminate sentence. The statute does not improperly subject defendant to enhanced punishment on the basis of the unproven charge that he was "armed" within the meaning of the "armed felony" definition since the statute does not give preclusive effect to the indictment's allegation that defendant was armed, notwithstanding the fact that there are differences in the sentencing discretion available when a defendant has pleaded guilty under an indictment charging an armed felony and what would be available had there been no armed felony charge. Nor does paragraph (c) improperly place upon the defendant the burden of proving one or more of the ameliorating factors referred to in subdivision (b) in violation of due process, by pleading to the class D violent felony, the defendant in effect admits for the purpose of sentence and subject to his right to a lesser sentence if the existence of one of the ameliorating factors be found by the court, that he was armed as charged, and any new facts found in the two-phase presentence hearing can only reduce, not enhance, the punishment imposed. Additionally, due process is not offended by the probability that in most cases establishment of an ameliorative factor will require that defendant come forward with proof.

POINTS OF COUNSEL

Michele Maxian, *Caesar D. Cirigliano*, *Barbara Salken* and *Bennett M. Lincoff* for appellant. I. The requirement of subdivision 5 of section 70.02 of the Penal Law that defendant be subject to an enhanced sentence on the basis of an unproven allegation in the indictment unless he can prove mitigating circumstances is fundamentally unfair and, therefore, a violation of due process, not equal protection. (*People v Drummond*, 40 NY2d 990, cert den *sub nom. New York v Luis J.*, 431 US 908; *People v Elliby*, 80 AD2d 875; *People v Drayton*, 39 NY2d 580; *United States v Craven*, 478 F2d 1329, 414 US 866, 1086; *United States v Thoresen*, 428 F2d 654; *People v Griffin*, 7 NY2d 511.) II. Appellant has properly preserved his challenge to subdivision 5 of section 70.02 of the Penal Law in its entirety. Moreover, the procedural provisions of paragraph (c) fail to provide necessary due process protections and cannot, therefore, shelter paragraphs (a) and (b) from attack. (*Specht v Patterson*, 386 US 605; *Griffin v New York*, 7 NY2d 511; *United States ex rel. Gerchman v Maroney*, 355 F2d 302; *Brady v Maryland*, 373 US 83.)

Robert M. Morgenthau, *District Attorney* (*Donna Krone*, *Amyjane Retteu* and *Vivian Berger* of counsel), for respon-

dent. The Legislature's limitation on the imposition of definite or nonincarcerative sentences on persons who are initially charged with an armed felony but are permitted to "plead down" to a lesser crime, is a rational restriction on plea bargaining. Moreover, the specific statutory procedures for seeking a more lenient sentence did not deny him due process of law. (*People v Farrar*, 52 NY2d 302; *People v Pagnotta*, 25 NY2d 333; *Matter of Van Berkel v Power*, 16 NY2d 37; *Weems v United States*, 217 US 349; *People v Esajerre*, 35 NY2d 463; *People v Elliby*, 80 AD2d 875; *People v Bartley*, 60 AD2d 283; *Santobello v New York*, 404 US 257; *People v Eason*, 40 NY2d 297; *People v Broadie*, 37 NY2d 100, 423 US 950; *People v McKay*, 21 AD2d 142; *United States v Di Francesco*, 449 US 117; *Bordenkircher v Hayes*, 434 US 357, 435 US 918; *People v Selikoff*, 35 NY2d 227.)

OPINION OF THE COURT

MEYER, J.

There is no due process infirmity under either the Federal or the State Constitution in the requirement of subdivision 5 of section 70.02 of the Penal Law that a defendant who has been charged with an armed felony and permitted in satisfaction of the indictment to plead guilty to a class D violent felony must receive an indeterminate sentence of one to three years unless the court finds that factors specified in the section warrant imposition of less than an indeterminate sentence. The order of the Appellate Division affirming the judgment of conviction of defendant should, therefore, be affirmed.

I

While allegedly displaying both a knife and what appeared to be a pistol, defendant stole a "Grateful Dead" button from another passenger on a subway train. Indicted for robbery in the first degree (using or threatening the immediate use of a dangerous instrument [the knife]), robbery in the second degree (displaying what appeared to be a pistol), attempted robbery in the first degree and two counts of criminal possession of a weapon in the fourth degree, defendant pleaded guilty to "attempted robbery in the second degree, as a violent felony under an indictment

charging you with an armed violent felony; the plea to be in full satisfaction of the indictment and the plea being under the first count of the indictment". As part of the plea colloquy the Trial Judge explained to defendant "that a class D felony under this indictment which charges an armed violent felony in the second count, even though your plea is to a simple violent felony as a class D, attempt [*sic*] robbery in the second degree, would require the Court to impose as a minimum sentence no less than one, no more than three years in state prison as a minimum sentence" but stated that defendant's attorney could make and the court would consider "an application for a lesser sentence due to mitigating circumstances". Defendant admitted as part of the plea that he used or threatened immediate use of a knife, but was not questioned with respect to the display of what appeared to be a pistol and, therefore, did not directly admit the commission of an armed felony as that term is defined in CPL 1.20 (subd 41).

By memorandum and again at the time of sentence, defendant sought a reduced sentence on the basis of mitigating circumstances. His application was denied on the ground that the circumstances did not, as required by section 70.02 (subd 5, par [b]) of the Penal Law, bear upon the manner in which the crime was committed. He also argued that the provisions of that subdivision[1] violate the

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1. The subdivision provides:

"(a) Except as provided in paragraph (b) of this section, where a plea of guilty to a class D violent felony offense is entered pursuant to section 220.10 or 220.30 of the criminal procedure law in satisfaction of an indictment charging the defendant with an armed felony, as defined in subdivision forty-one of section 1.20 of the criminal procedure law, the court must impose an indeterminate sentence of imprisonment pursuant to section 70.00.

"(b) In any case in which the provisions of paragraph (a) hereof or the provisions of subparagraph (ii) of paragraph (c) of subdivision two of this section apply, the court may impose a sentence other than an indeterminate sentence of imprisonment, or a definite sentence of imprisonment for a period of no less than one year, if it finds that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed, or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution, or (iii) possible deficiencies in proof of the defendant's commission of an armed felony.

"(c) The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) hereof, and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that an indeterminate sentence of imprisonment should not be imposed pursuant to the provisions of such

(a more)

due process clauses of the Federal (US Const. 14th Amdt.) and State (NY Const. art. I, § 6) Constitutions.

The Trial Judge held the subdivision constitutional and imposed the one- to three-year sentence required by section 70.00 of the Penal Law. Distinguishing our decision in *People v. Drummond* (40 NY2d 990, cert den *sub nom. New York v. Luis J.*, 431 US 908) on the ground that the statute there in question made an indicted youth automatically ineligible for youthful offender treatment based upon the highest count of the indictment, he noted that the three exceptions contained in section 70.02 (subd 5, par [b]) of the Penal Law "allow the Court much of its usual sentencing discretion regardless of the top count of the Indictment" and that the statute only limited the Judge's sentencing discretion by establishing guidelines and conditions for its exercise.

On appeal a sharply divided Appellate Division affirmed (87 AD2d 529). Two Judges held that the constitutional issue need not be reached because they concluded that if the sentencing scheme of the statute were unconstitutional and they exercised sentencing discretion unfettered by the guidelines and conditions of the statute they would find the indeterminate three-year term appropriate. A third Judge, concurring for affirmance, reached the constitutional issue and concluded that subdivision 5 represented a rational legislative attempt to encourage bargained for pleas of guilty to lesser offenses while discouraging overly lenient sentences for persons charged in an indictment with an armed felony. The two dissenting Judges held the subdivision unconstitutional "because it requires that a defendant be subjected to enhanced punishment on the basis of an unproven charge, without requiring the People to make any additional showing, thus impermissibly placing upon the defendant the burden of extricating himself from the enhanced sentence" (87 AD2d, at p 540). The matter is before us by leave of one of the dissenting Judges at the Appellate Division (56 NY2d 656). We conclude that the

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paragraph (b), it shall make a statement on the record of the facts and circumstances upon which such determination is based. A transcript of the court's statement, which shall set forth the recommendation of the district attorney, shall be forwarded to the state division of criminal justice services along with a copy of the accusatory instrument."

due process issue must be met and that the statute is constitutional.

II

It is hornbook law that a court will not pass upon a constitutional question if the case can be disposed of in any other way (*Matter of Peters v New York City Housing Auth.*, 307 NY 519, 527-528; McKinney's Cons Laws of NY, Book 1, Statutes, § 150; 20 NY Jur 2d, Constitutional Law, § 47). Thus, had the Appellate Division been able to find in the record evidence of mitigating circumstances of the type provided for in the statute, it could have and should have avoided deciding the due process issue.

Here, however, the plurality for affirmance at the Appellate Division while seeking to avoid the constitutional question did not in fact do so. Rather it ignored the facts that sentencing is a function of the Trial Judge (see CPL 380.20; *People v Green*, 75 AD2d 502; *People v Gomez*, 103 Misc 2d 352) and that subdivision 5 of section 70.02 of the Penal Law restricts the discretion in relation to plea negotiation exercised by a Trial Judge, and sustained the sentence imposed as a proper exercise of the discretion vested in the Judges of the Appellate Division. In doing so it has avoided the *effect* of holding the statute unconstitutional (i.e., reversal) but assumed that the Trial Judge would not, had he been free to weigh all the factors that bear on sentencing, have imposed a lesser sentence, or that if he had, the Appellate Division would have been free to increase, and would have increased, the sentence to that which it was upholding by the exercise of independent discretion. Those assumptions are, however, unfounded (as to sentencing at the appellate level, see *Gardner v Florida*, 430 US 349, 354, n 5; and *People v Green*, *supra*; as to the impropriety of an increased sentence, see CPL 450.30, subd 2). Consequently, the constitutional issue cannot be avoided.

III

Enacted at an extraordinary session of the Legislature as a "key" part of a program intended to combat violent

2. Defendant's reply brief in this court makes clear that his "challenge is not based on equal protection."

crime, section 70.02 of the Penal Law was intended to establish greater responsibility for an armed violent felony through stiffer sentencing provisions and restrictions upon plea bargaining (see Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law, § 70.02, 1982-1983 Cum Ann Pocket Part, pp 132-133; Book 11A, CPL 100.15, p 25). The Legislature did not choose to abolish plea bargaining as it could have (*People v Esslerre*, 35 NY2d 463, 467; see *Santobello v New York*, 404 US 257, 262). Rather it opted to limit the broad discretion previously exercised in the determination of the crime to be pleaded to and the sentence to be imposed. This it did by (1) proscribing acceptance of a plea to less than a class D violent felony offense from a defendant indicted for a class B or C violent felony offense[3] (CPL 220.10, subd 5, par [d]), and (2) requiring imposition of an indeterminate sentence on the bargained class D violent felony offense, absent specified ameliorating factors (Penal Law, § 70.02, subd 5), when a defendant has been indicted for an "armed felony" as defined in CPL 1.20 (subd 41) (a violent felony offense aggravated by use of a loaded and functional firearm or display of what appears to be a firearm of a specified type). It is the latter provision which defendant argues violates his right to due process by (1) prescribing the sentence to be imposed upon the basis of an unproved and unadmitted fact and (2) shifting to him the burden of establishing the right to a lesser sentence. We disagree.

A

Defendant's claim that the statute improperly subjects him to enhanced punishment on the basis of the unproven charge that he was "armed" within the meaning of the "armed felony" definition is largely predicated on *People v Drummond* (40 NY2d 990, *supra*) and *People v Griffin* (7 NY2d 511). There are, of course, differences in the sentencing discretion available when a defendant has pleaded guilty to a class D violent felony under an indictment charging an armed felony and what would be available had there been no armed felony charge in the indictment under

3. The constitutionality of that provision is not before us, but has been upheld by the Appellate Division, Second Department, in *People v Ellis* (80 AD2d 875, mot for lv to app den 53 NY2d 842).

which he pleaded, not only is there a minimum prescribed sentence but also the mitigating circumstances that may be considered relate only to the manner in which the crime was committed and do not include circumstances relating to defendant's past history and family situation, circumstances which may be considered by a Judge sentencing a defendant who pleaded under an indictment not charging an armed felony. Neither *Drummond* nor *Griffin* goes so far, however, as to hold, as defendant argues, that reliance to *any* extent on the indictment (as distinct from the facts admitted during the plea colloquy) to determine the minimum permissible sentence violates due process.

The infirmity of the statute involved in *Drummond* (CPL 720.10 ff.) which conditioned youthful offender treatment on the highest count of the indictment but contained no ameliorative provision was, as the memorandum establishes, that its "limitations make the privileged penal sanction to be imposed depend *solely* upon an accusation, however formal, rather than an adjudication, however informal, in the adversarial criminal process" (40 NY2d, at p 992; emphasis supplied). Here there is no such automatic prescription, for the subdivision in question vests the sentencing Judge with discretion to impose a lesser sentence when one of its ameliorative factors is found to be present and defendant was made aware prior to the acceptance of his plea in satisfaction of the indictment of both the minimum prescribed sentence that would result and the possibility of a lesser sentence if the court found one of the ameliorative factors to exist. Adjudication, though with something less than trial formality, thus has an important role; sentence does not depend solely on accusation.

People v Griffin (7 NY2d 511, *supra*) is no more helpful to defendant, for the statute there involved (Penal Law of 1909, § 1944) made no provision for the postplea presentence inquiry concerning whether Griffin was armed, which the sentencing Judge took it upon himself to conduct as a basis for imposing a sentence heavier than could have been imposed for the unarmed crime to which Griffin had pleaded. Here, as already noted, defendant was advised prior to acceptance of his plea of the effect of the indictment's "armed felony" allegation and the subdivision con-

tains detailed provisions concerning the hearing available as a possible means of defendant's obtaining a sentence less than that otherwise prescribed by its provisions.

Although an indictment may not be given preclusive effect as to an unadmitted charge (see *People v Ellsby*, 80 AD2d 875), it "can give rise to ancillary consequences beyond the formal notification and delineation of the charges" (*People v Brian R.*, 76 Misc 2d 616, 618, affd 47 AD2d 599). Thus, the offenses charged in dismissed counts of an indictment may be considered by the sentencing Judge even over defendant's objection (*Billiteri v United States Bd. of Parole*, 541 F2d 938, 944; see *United States v Needles*, 472 F2d 652; Schulhofer, Due Process of Sentencing, 128 U of Pa L Rev 733, 763; Ann., 96 ALR2d 768, 787).

Considered in relation to the broad power of the Legislature with respect to sentencing, the purpose sought to be accomplished by the subdivision in question and the fact that it does not give preclusive effect to the indictment's allegation that defendant was armed, we conclude that the subdivision's prescription of the minimum sentence to be imposed absent a finding of an ameliorating factor does not violate the due process clause of either the Federal or the State Constitution (see *People v Cauer*, 74 AD2d 852).

B

No more violative of due process are the procedural provisions of paragraph (c) with respect to the hearing to be held. Defendant was accorded no hearing because the mitigating circumstances set forth in the memorandum submitted on his behalf concerned his prior history rather than the manner in which the crime was committed. He argues, nevertheless, that paragraph (c) improperly places upon him the burden of proving one or more of the ameliorating factors referred to in paragraph (b).[4] Although the

4. The People, relying on *People v Thomas* (50 NY2d 467) and *People v Patterson* (39 NY2d 288, affd sub nom. *Patterson v New York*, 432 US 197), suggest that defendant's burden of proof argument, not having been presented to the trial court, was not preserved. Although defendant's memorandum to the trial court was not as explicit as to his present burden of proof argument, his trial court attack was upon the entire subdivision and its use of an unproven fact. Unlike *Thomas* and *Patterson*, which

(a more

paragraph speaks only of "an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b)" and accords that opportunity to both the defendant and the District Attorney. Its practical effect is to impose upon a defendant who seeks a determinate sentence an obligation to present evidence he would not otherwise be required to present. In doing so it does not, however, impinge upon due process.

Due process protections apply to sentencing as well as to the trial itself (*Gardner v Florida*, 430 US 349, 358, *supra*), but the "due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure" (*Williams v New York*, 337 US 241, 251, reh den 337 US 961, 338 US 841) and does not "implicate the entire panoply of criminal trial procedural rights" (*Gardner v Florida*, 430 US, at p 358, n 9).[5] Defendant points to *Specht v Patterson* (386 US 605), however, and argues that here, as in *Specht*, the existence of one of the ameliorating factors requires the making of new factual findings on an issue distinct from that encompassed by the guilt determination. We think *Specht* readily distinguishable.

Specht involved a defendant convicted under a Colorado indecent liberties statute under which the maximum sentence that could be imposed was 10 years. The trial court, without holding a hearing, used that conviction as a basis for sentencing Specht under the Sex Offenders Act, a separate statute, the maximum under that act being life imprisonment. The Supreme Court held that due process required that defendant have the right to be present with

involved a burden shifting charge to which specific exception was required, the argument here made to the trial court sufficiently suggested that the burden was on the People to prove that defendant was armed, rather than on defendant to prove that he was not, before he could be deprived of the broader sentencing discretion otherwise available.

5. The *Gardner* opinion expressly adhered to the prior *Williams* holding (430 US, at p 356) but was joined in only by Justices STEVENS, STEWART and POWELL. The Chief Justice and Justices BRENNAN, WHITE and BLACKMUN concurred in the judgment, Justice BRENNAN only in part because he viewed the death penalty as unconstitutional. Justice MARSHALL and Justice REHNQUIST, dissenting, considered only the latter point and not the due process issue. The language above quoted from *Williams* and *Gardner* appears, therefore, still to be the view of a majority of the court (see *United States v Grayson*, 438 US 41).

counsel, to confront and cross-examine witnesses and to present evidence on his own behalf before the court could, on the basis of a new factual finding on the "distinct" issue which the Sex Offenders Act involved, impose a sentence heavier than that permitted for the crime of which he stood convicted (386 US, at p 610; see Schulhofer, *op. cit.*, p 762), a holding essentially similar to that of this court in *People v Griffin* (7 NY2d 511, *supra*).

Subdivision 5 of section 70.02 of the Penal Law involves no new criminal charge, no separate statute, no new finding of fact on a distinct issue as the basis for increased punishment. What it does rather is require as part of one statutory scheme that a defendant indicted for an armed felony but permitted to plead to a lesser offense be sentenced to an indeterminate term, while permitting imposition of a lesser sentence if after a hearing the sentencing Judge finds the existence of one of the ameliorating factors it specifies. By pleading to the class D violent felony with the knowledge that because the indictment charges an armed felony the sentence on the class D felony will be indeterminate, the defendant in effect admits, for the purpose of sentence and subject to his right to a lesser sentence if the existence of one of the ameliorating factors be found by the court, that he was armed as charged in the indictment. He is, moreover, accorded the right to deny or explain which due process requires (*Gardner v Florida*, 430 US, at pp 356, 362; see *People v Daniels*, 58 AD2d 585, 586). Furthermore, the new facts found in the postplea presentence hearing can only reduce, not enhance,[6] the punishment imposed. Thus, *Specht* does not require invalidation of subdivision 5 of section 70.02 of the Penal Law on Federal due process grounds and we perceive no reason for applying the due process clause of the New York Constitution differently.

Finally, we note that due process is not offended by the probability that in most, though not necessarily in all,

6. Compare *United States v Stewart* (531 F2d 326, 332, cert den 426 US 922; see Ann., 41 ALR Fed 576) holding that the Federal dangerous special offender statute (US Code, tit 18, § 3575), which permits imposition of an increased sentence after a finding on the basis of a preponderance of the evidence, that defendant is such an offender, does not involve a new criminal charge.

cases establishment of an ameliorative factor will require that defendant come forward with proof. In *People v Calcano* (30 NY2d 68, 75, cert den 407 US 923) we noted, in upholding a statute (Penal Law, § 25.00, subd 2) imposing upon defendant the burden of establishing the defense of entrapment, that "presumptions, burdens of going forward, and burdens of persuasion in criminal cases may be placed on defendants" provided the State has "first proved enough of its case" and that there "be justifying reason to shift the burden either because knowledge of the facts is peculiar to the defendant or the onus is based on probabilities of wrongdoing." Here the People's case has been sufficiently made by defendant's plea entered under this statute for by so doing he impliedly concedes being armed, as part of his plea bargain and subject to his right to present "relevant information" concerning "possible deficiencies in proof of [his] commission of an armed felony" or other specified circumstances bearing on commission of the crime to which he has pleaded (Penal Law, § 70.02, subd 5, pars [b], [c]). In many cases, moreover, knowledge of the facts necessary to establish a basis for a lesser sentence will be peculiar to defendant, and in every case, by the Grand Jury's return of an armed felony indictment which must be based upon reasonable cause (CPL 190.65), the probability of wrongdoing is sufficiently present to justify such burden shifting as the subdivision involves.[7]

For the foregoing reasons, the order of the Appellate Division should be affirmed.

JONES, J. (dissenting). I share the conviction of the dissenting Justices at the Appellate Division that subdivision 5 of section 70.02 of the Penal Law is unconstitutional under both Federal and New York State Constitutions as working a denial of due process. In my view constitutionally guaranteed due process is denied when the scheme of sentencing is to any significant extent made to turn on a charge set forth in the accusatory instrument but which

7. That the Legislature has imposed upon the People the burden of proving beyond a reasonable doubt the commission of prior crimes under statutes requiring enhanced punishment for recidivists (CPL 400.15, subd 7, par [a], 400.20, subd 5, 400.21, subd 7, par [a]) does not mandate establishment of like procedure under subdivision 5 of section 70.02 of the Penal Law.

has been neither proved by the People nor admitted by the defendant.

This was I had thought the teaching of *People v Drummond* (40 NY2d 990). Under the statute held unconstitutional in that case, the unproved and unadmitted higher charge was the sole factor leading to preclusion of consideration of youthful offender treatment but it was not the sole factor determinative of the defendant's ultimate sentence. By parallel analysis, the fact that the indictment in this case charged defendant with an armed felony was the sole factor which exposed him to the sentencing structure of subdivision 5 of section 70.02 but was not determinative of the precise sentence he would receive. I find nothing in *Drummond*, either in the opinion in our court or in the dissenting opinion at the Appellate Division, to suggest that the rationale for the court's determination of unconstitutionality turned on whether the alternative frame of sentencing made applicable by the charge in the indictment was rigid (as in *Drummond* — exclusion from consideration for youthful offender treatment) or flexible (as in the present case — an indeterminate sentence in the absence of a finding of one of the factors set out in paragraph (b) of subdivision 5). The critical factor to the holding of unconstitutionality in *Drummond* was that the alternative sentencing category applicable to the defendant was determined by only an allegation of conduct which had not been proved or admitted. "By according a decisive role in the determination of which youths are eligible for youthful offender treatment to nothing more substantial than a written statement of unproven allegations (see CPL 1.20, subd 3), the statute offends reasonable notions of fairness. There is no reasonable justification or necessity for fixing the degree of the crime charged as the determinative factor. It is clear that an indictment does not survive a trial and verdict; it should play no part in determining the type of postconviction treatment" (*People v Drummond*, 51 AD2d 1, 15). I perceive no principled ground on which our decision in *Drummond* can be distinguished.

Additionally, and in any event, to construe defendant's plea of guilty to the class D violent felony as an implied

admission that he was armed as charged in the first count of the indictment to which he did not plead guilty (as does the majority, pp 166, 167) is to rely on what would be a wholly fictitious construct. If anything is unmistakably clear, it is that by pleading guilty to the lesser count in full satisfaction of the entire indictment, defendant was not required to admit the elements of the armed felony charged in the first count (or of the offenses charged in any of the other counts to which he did not plead), and of course the criminal transaction charged in the armed felony count has never been proved by the People. Is it to be taken that wherever a defendant pleads guilty to one count in satisfaction of an indictment charging an armed felony that he will be deemed to have admitted that he was armed?

Chief Judge COOKE and Judges JASEN, WACHTLER, FUCHSBERG and SIMONS concur with Judge MEYER. Judge JONES dissents and votes to reverse in a separate opinion.

Order affirmed.

APPENDIX B

Appellate Division's
Order and Decision

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 16, 1982

A. 15

Present—Hon. Francis T. Murphy, Jr., Presiding Justice
Harold Birns
Joseph P. Sullivan
Vincent A. Lupiano
Max Bloom, Justices.

The People of the State of New York,
Respondent,
-against-
David Felix,
Defendant-Appellant.

Order of Affirmance on Appeal from Judgment
12331

An appeal having been taken to this Court by the defendant-appellant

from the judgment of the Supreme Court, New York County (Fitzer, J.),

rendered on August 28, 1980, convicting defendant of attempted robbery in the second degree.

and said appeal having been argued by Michele Maxian

of counsel for the appellant, and by Vivian Berger

of counsel for the respondent, and due deliberation having been had thereon,

It is ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. [Birns, J., concurs in a memorandum in which Bloom, J. concurs; Lupiano, J. concurs in a separate memorandum; Murphy, P.J. and Sullivan, J., dissent in a memorandum by Sullivan, J.]

ENTER:

JOSEPH J. LUCCHI
Clerk.

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

March 16, 1982

The Court announces the following decisions:

Murphy, P.J., Birns, Sullivan, Lupiano, Bloom, JJ.

12331 The People of the State of New York,
Respondent, V.Berger

-against-

David Felix,
Defendant-Appellant. M.Maxian

Judgment, Supreme Court, New York County (Fitzer, J.), rendered on August 28, 1980, affirmed. All concur except Birns, J., who concurs in a memorandum in which Bloom, J., concurs, and Lupiano, J., who concurs in a separate memorandum, and Murphy, P.J., and Sullivan, J., who dissent in a memorandum by Sullivan, J., all as follows:

BIRNS, J. (concurring)

Defendant was indicted for, inter alia, robbery in the second degree as an armed and violent Class C felony (CPL §1.20, subd. 41; P.L. §70.02, subd. 1, §160.10). The court accepted defendant's plea to the instant Class D violent felony offense on the understanding that a term of one to three years would be imposed, the shortest indeterminate term of imprisonment permissible under P.L. §70.02, subd. 5(a), and further that an application for a lesser sentence on the basis of mitigating circumstances pursuant to P.L. §70.02 subd. 5(b) would be carefully considered. At a later date, the court found insufficient mitigating circumstances to warrant a term less than the minimum one to three years otherwise required by P.L. §70.02 subd. 5. Thereafter, defendant challenged the constitutionality of that section on the ground that it violated due process in excluding him from more lenient treatment on the basis of the crime for which he was indicted (see People v. Drummond, 40 NY 2d 990). The court rejected this challenge, finding the statute did not automatically exclude defendant's eligibility for a lesser sentence on the basis of the crime charged in the indictment but only established guidelines and conditions bearing upon the court's discretionary power to grant an alternative, lesser sentence. Indeed, the court found that the three exceptions set forth in P.L. §70.02 subd. 5(b) "allowed the Court much of its usual sentencing

APPEAL NO. 12331 CONTINUED

discretion regardless of the top count of the Indictment." At the sentencing hearing, the court again denied defendant's application for a lesser sentence based on mitigating circumstances and the term of one to three years was imposed.

On this appeal, defendant again challenges the constitutionality of P.L. §70.02 subd. 5. We do not believe it necessary to address the constitutional issues in order to determine this appeal. Were the defendant correct in arguing that the statute is unconstitutional (but see People v. Caver, 74 AD 2d 852, People v. Elliby, ___ AD 2d ____, 436 NYS 2d 794), he would at best be entitled to the exercise of discretion in sentencing, unfettered by the guidelines and conditions set forth in the statute. Any failure of the sentencing court to exercise the full scope of discretion or to take into consideration all relevant factors can be remedied by the exercise of unfettered discretion by this court (People v. Dolkart, 60 AD 2d 238, 240). Nor does the difference between the indeterminate one to three year term imposed under the challenged statute and the shortest indeterminate term of imprisonment which could have been imposed in the absence of this statute give vitality to defendant's constitutional argument. In either case, the shortest minimum and maximum periods of imprisonment are fixed by reference to the same statute, P.L. §70.00; the shortest minimum at one year by subdivision 3 thereof and the shortest maximum at three years by subdivision 2 thereof.

Upon review of this record, even were we to exercise our unfettered discretion in sentencing, we can only conclude that the imposition of a three year indeterminate term of imprisonment was appropriate. Thus, we need take no corrective action.

APPEAL NO. 12331 CONTINUED

LUPIANO, J. (concurring)

Defendant pleaded guilty to attempted robbery in the second degree, a class D violent felony offense, under the first count of the indictment charging robbery in the first degree (uses or threatens the immediate use of a dangerous instrument, to wit, a knife), a class B felony. The second count of the indictment charged defendant with robbery in the second degree (displaying what appeared to be a pistol), a class C felony which is also defined as an "armed felony" (See, Criminal Procedure Law § 1.20 [41]). Pursuant to Penal Law § 70.02(5), the Legislature has provided that where a defendant, confronted by an indictment charging an "armed felony," specifically pleads guilty to a class D violent felony in satisfaction of the indictment, pursuant to section 220.10 or 220.30 of the Criminal Procedure Law, the court must impose an indeterminate sentence of imprisonment pursuant to Penal Law § 70. However, the court is permitted to

> "impose a sentence other than an indeterminate sentence of imprisonment or a definite sentence of imprisonment for a period of no less than one year, if it finds that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the defendant's commission of an armed felony" (Penal Law § 70.02[5][b]).

The statute further provides that both

> "(t)he defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) ...."

I join our dissenting brother in the view that the constitutional issue presented on this appeal respecting the above statute cannot be avoided. However, I find the statute to be constitutional.

The facts and legal issues bearing on the question of

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constitutionality are ably set forth in the dissent and are not reiterated herein. Critical to the rationale of the dissent is its observation that

> "(s)ince Penal Law § 70.02[5] precludes the imposition of a more favorable sentence which would otherwise be available, its effect is to impose increased punishment on the basis of an act charged, but unproven. In this respect section 70.02[5] is ... fundamentally unfair and violative of due process" (Emphasis supplied)

However, the act charged, but unproven, has been rendered so by virtue of the permission granted the defendant to plead guilty to a lesser charge and thereby to avoid a trial on the act(s) charged. The dissent's observation would obtain relevance if the defendant had a right to plead guilty to a lesser crime. No such right exists.

> "At the outset it is noted that defendant had no absolute right to have [his] plea of guilt accepted (Lynch v. Overholser, 369 U.S. 705; Santobello v. New York, 404 U.S. 257)" (People v. Bartley, 60 A.D.2d 283, 285 [1st Dept. 1977]).

Criminal Procedure Law § 220.10 provides, in subdivision 1, that

> "(t)he defendant may as a matter of right enter a plea of 'not guilty' to the indictment"

and in subdivision 2, that

> "the defendant may as a matter of right enter a plea of 'guilty' to the entire indictment,"

except as provided in subdivision 5 (Emphasis supplied). It has aptly been observed that "permission to enter a lesser plea is a matter of grace" and that, accordingly, "reasonable conditions may be attached thereto" (People v. Esajerre, 35 N.Y.2d 463, 467 [1974]; see, People v. Elleby, 80 A.D.2d 875 [2nd Dept. 1981], lv. to appl. den. 53 N.Y.2d 942)

There are two avenues by which a defendant stands convicted of a crime: (1) he may be found guilty by the finder of facts after a jury or non-jury trial upon a plea of not guilty, or

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(2) he may plead guilty to the crime(s) of which he stands convicted. The defendant exercises full control over his destiny in the second course, in that he chooses to plead guilty to the entire indictment and has a right to do so. If he chooses to plead guilty, not to the entire indictment, but to a lesser crime or crimes, then the matter is one of grace in which permission must be obtained. Here, before the defendant could enter a plea of guilty to a lesser crime, he had to obtain the permission of the court and the consent of the People (CPL 220.10, subd. 4). While the defendant initially has full control, in that he may plead "not guilty" or "guilty" to the entire indictment, once he endeavors to plead guilty to one or more, but not all of the offenses charged or of a lesser included offense with respect to any or all of the offenses charged, or of any combination of offenses charged and lesser offenses included within other offenses charged, his control is less than full, in that he must now obtain the permission of the court and the consent of the People. As this route does not permit of a possible conviction of all the offenses as charged in the indictment, that is, the defendant is not at risk of being convicted of the offenses as charged in the indictment, whether by way of trial and a finding of guilty, or by way of pleading guilty, the legislative branch has determined to circumscribe the privilege thus afforded defendant in escaping that risk.

McKinney's Practice Commentary to Penal Law § 70.02, Book 39 (sections 1.00 to 139, end) in the 1981-1982 Cumulative Annual Pocket Part at pp. 119-120, states, in pertinent part, as follows:

"During the past few years there has been a steadily mounting concern among the public and its officials over

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> a constantly increasing incidence of violent stranger-to-stranger crime .... (A) wide-ranging bill was enacted (L. 1978, c.481) that attempts to address violent crime committed not only by adults but also by juveniles. Section 70.02 is probably the key section of the entire violent felony offender legislation. Here the 'violent felony offenses' are defined (subdivision 1) and the sentences upon conviction thereof set forth .... Subdivision 5 introduces a new term, 'armed felony', which is defined in Criminal Procedure Law § 1.20(41) as any violent felony offense defined in this section (§ 70.02[1]) which includes as an element thereof the possession, being armed with or causing serious physical injury by means of a loaded operable gun or displaying what appears to be a firearm. The consequences of being charged with an armed felony is that rigid plea bargaining restrictions are imposed .... A charge of armed felony has, as evidenced by subdivision 5 of this section, further implications upon the sentence when a plea of guilty to a class D violent felony is predicated on [i.e. 'in satisfaction of an indictment' containing] an armed felony charge" (Emphasis supplied).

Defendant in pleading guilty to attempted robbery in the second degree under the first count of the indictment in satisfaction of such indictment which contained an armed felony charge, was fully informed of the sentencing restrictions placed upon the plea bargaining process by the Legislature and freely chose to so plead. It was defendant's choice, his option, to so plead.

The dissent perspicaciously notes that

> "(i)n enacting Penal Law § 70.02[5] the legislature chose to limit plea bargaining in instances where a defendant is charged with an armed felony by restricting the sentencing options available when such a defendant pleads guilty to a class D violent felony."

This is indeed what subdivision 5 does -- no more, no less. We are unanimous in the view that the Legislature has the power and could choose to disallow plea bargaining altogether in those instances where the indictment charges an armed felony offense. A plea bargain is, as the term implies, a bargain as to a plea of guilty given by the defendant in consideration of more lenient treatment by the prosecutor and the court. It is the process by which a conviction may be obtained on consent of the defendant. It is not comprised of the conviction itself, which is the goal, but not the predicate for the guilty plea. Indeed, a defendant

may plead guilty without admitting the facts of the crime to which he offers to plea (See, North Carolina v. Alford, 400 U.S. 25 [1970]; People v. Serrano, 15 N.Y.2d 304 [1965]; Cumberland Pharmacy v. Blum, 69 A.D.2d 903 [2nd Dept. 1979]; he may plead guilty to a "hypothetical crime" based upon no objective facts (See, People v. Francis, 38 N.Y.2d 150 [1975]; People v. Griffin, 7 N.Y.2d 511 [1966]), or to a non-existent crime (See, People v. Foster, N.Y.2d 1950 [1967]; People v. Francis, supra). However, a defendant may not enter into a plea bargain designed to vitiate "the legal scheme of punishment" embodied in a statute (People v. Lopez, 28 N.Y.2d 148 [1971]). Here the plea bargain was designed not to vitiate, but to honor the legal scheme of punishment delineated in Penal Law § 70.02(5). The dissent opines that this statute with its sentencing restrictions regarding those who plea bargain by pleading guilty to a class D violent felony offense in satisfaction of an indictment charging an armed felony, would pass constitutional muster if the restrictions were based not upon the crime(s) charged, but upon the crime(s) of which defendant stands convicted. This, in my view, is placing the cart before the horse. The plea bargaining process is limned against the crimes of which defendant stands accused, and it is these crimes which impinge upon the bargaining position of the parties, the defendant on the one side and the People on the other.

It is noted at this point that the Second Department in People v. Caver, 74 A.D.2d 852 (1980) declared at pp. 852 - 853:

> "We have reviewed defendant's contention that section 70.02 of the Penal Law violates the Constitution of New York and the United States in that it imposes cruel and unusual punishment and abrogates the separation of legislative and judicial powers, and find this contention to be without

merit (see People v. Broadie, 37 N.Y.2d 100, cert den 423 U.S. 950; People v. Eason, 40 N.Y.2d 297)."

Penal Law § 70.02(5) has a rational basis. It specifically relates to an indictment charging the defendant with an armed felony. The only method of prosecuting a criminal offense in a superior court is by indictment returned by the grand jury, unless the defendant waives the indictment and consents to be prosecuted on an information filed by the district attorney whose consent is required to effectuate such waiver (CPL §§ 195.10; 210.05). The evidence before the grand jury must be sufficient to "provide reasonable cause to believe that such person committed such offense" before such charge is warranted (CPL § 190.65[1][b]). If the evidence before the grand jury is not legally sufficient, or the grand jury is not satisfied that there is reasonable cause to believe that such person committed such crime or other offense, the charge must be dismissed (CPL § 190.75). After arraignment upon an indictment, the defendant may move to dismiss the indictment or any count thereof on the ground that the evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense (CPL §§ 210.20[1][b]; 210.30). Based upon the fact that a neutral body, the grand jury, has determined that the evidence before it is sufficient to provide "reasonable cause to believe that such person committed such offense," in this instance, that defendant committed an armed felony, it is not irrational for the Legislature to differentiate in respect of allowable sentencing alternatives between such a defendant and one who has not been indicted for so grave a crime where the privilege of "pleading down" operates.

Instead of prohibiting plea bargaining, the Legislature voted to permit a defendant thus charged to "plead down" to a

class D violent felony with the prosecutor's consent. However, the Legislature was clearly concerned that even a restriction on the extent to which an accused confronted by an armed felony charge could "plead down" to a lesser crime would not necessarily prevent overly lenient sentences from being given to persons accorded the benefits of such pleas. To avert as far as practicable overly lenient sentences, the Legislature reasonably limited the sentencing options available to the court where a defendant pleads guilty to a class D violent felony after being charged with an armed felony. If it is assumed that the Legislature could not permissibly restrict the range of sentencing alternatives in this situation, then the Legislature might well opt not to allow plea bargains at all respecting defendants charged in an indictment with an armed felony. Such a course would be detrimental, not only to society's interest, but also to the defendant's interest and the interests of other defendants similarly placed. There is no valid reason why the judicial branch of government should confront the legislative body with a "Hobson's choice" of this nature.

In People v. Drummond, 40 N.Y.2d 990 (1976), the Court of Appeals declared subdivision 2 of CPL 720.10, insofar as it provided that a person between the ages of 16 and 19 is eligible for youthful offender treatment "unless he ... is indicted for a class A felony," unconstitutional in that it absolutely conditioned such eligibility on the highest count of the indictment. In so doing, that Court relied on the dissenting opinion of Justice Rabin at the Appellate Division who found such classification to serve no legitimate and nonillusory State purpose (51A.D.2d at pp. 14-16). However, the classification providing that persons between the ages of 16 and 19 are eligible for youthful offender treatment unless they had previously been convicted of a felony was found to have

a reasonable basis. There are two critical distinctions between the instant statute (CPL 70.02[5]) and the statute found unconstitutional in Drummond, to wit, (1) the instant statute is concerned solely with plea bargaining, i.e. where a defendant charged with an armed felony "pleads down" to a class D violent felony, and (2) the instant statute contains an escape hatch in subsections (b) and (c). Eligibility for sentencing alternatives in the statute under review in Drummond depended solely on the highest count in the indictment and the defendant had no control, the statute being absolute in its application. It made no difference, therefore, whether the defendant pleaded guilty or was found guilty -- if the indictment charged him with a class A felony, he was ineligible for youthful offender treatment. Here, the subject statute is not geared solely to the highest count in the indictment, i.e., is not geared solely to the count charging an armed felony, but operates on an additional set of factors, to wit, the defendant's choosing to "plead down" to a plea of guilty to a class D violent felony. In itself, this is a vital distinction. The statute in Drummond did not concern itself with plea bargaining; the instant statute does.

The "escape hatch" provisions of CPL § 70.02(5) state, in pertinent part:

> "(b) In any case ... the court may impose a sentence other than an indeterminate sentence of imprisonment, or a definite sentence of imprisonment for a period of no less than one year, if it finds that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the defendant's commission of an armed felony. (c) The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) hereof.

and the court may, in its discretion, conduct a Hearing with respect to any issue bearing upon such determination." A. 26

It is aptly noted in Williams v. New York, 337 U.S. 241, 247-251 (1948):

> "Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime . . . .
>
> Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. . . .
>
> The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts -- state and federal -- from making progressive efforts to improve the administration of criminal justice."

The holding in Specht v. Patterson, 386 U.S. 605 (1967) does not detract from the applicability of the Williams v. New York rationale to the circumstances herein. In Specht, the United States Supreme Court adhered to Williams v. New York, supra, but viewed it as not extending to the radically different situation presented in Specht (386 U.S. at 608). Specht was convicted for indecent liberties under one Colorado statute that carries a maximum sentence of ten years. However, the trial court did not sentence him under such statute, but, instead, sentenced him under the Colorado Sex Offenders Act which carries an indeterminate term of from one day to life. The Sex Offenders Act operates where the court

> "'is of the opinion that any ... person [convicted of specified sex offenses], if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill' § 1" (386 U.S. at 607).

The United States Supreme Court duly noted that the Sex Offenders Act under which defendant was not convicted makes one conviction of specified sex offense(s)

> "the basis for commencing another proceeding under [such] Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender

> and mentally ill. That is a new finding of fact ... that was not an ingredient of the offense charged" (386 U.S. at 608) (Emphasis supplied).

Accordingly, it was held in Specht that the invocation of the Sex Offenders Act entailed the making of a new charge leading to enhanced punishment which requires under the Due Process Clause that defendant be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right of cross-examination and to offer evidence of his own, and that there be findings adequate to make meaningful any appeal that is allowed.

In our case, defendant is not confronted with a new charge having enhanced punishment, but is confronted with a plea bargain under a statute which imposes certain sentencing strictures on the sentencing court respecting the class D violent felony offense to which defendant pleaded guilty, concerning which strictures defendant was fully aware in voluntarily choosing to so plead, and which strictures are not absolute, but may be avoided under the "escape hatch" provisions. Simply stated, the statute (Penal Law § 70.02[5]) does not enhance punishment for the crime to which defendant pleaded guilty; it merely prescribes that punishment having due regard for the fact that defendant was afforded the privilege of "pleading down" to a class D violent felony. Subdivisions (b) and (c) of Penal Law § 70.02(5) do not enhance the punishment prescribed by subdivision (a) thereof, they permit a lessening of that punishment. Under these circumstances, the holding of Williams v. New York is fully applicable and the due process clause is not violated by Penal Law § 70.02(5). It is well recognized that in passing sentence,

> "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come" (United States v. Grayson, 438 U.S. 41,50

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[1978]; see, also, Roberts v. United States, 445 U.S. 552, 556 [1980]).

Indeed, relevant to the broad inquiry that may be conducted by the sentencing court, it was specifically recognized that the sentencing judge may take

> "into consideration facts directly related to the crimes with which the defendant was charged and to the crimes of which he was convicted, as revealed in the probation report"

and is not frustrated in this endeavor

> "merely because the defendant in pleading guilty to some counts of the indictment did not plead guilty to other counts" (People v. Smith, 24 A.D.2d 760, 761 [2nd Dept. 1965]).

Penal Law § 70.02(5) involves no mandatory presumption and does not purport to allocate either a burden of going forward or a burden of persuasion; it merely calls for individualized determinations within the legislative guidelines. In sum, Penal Law § 70.02(5) represents a rational attempt by the Legislature to accommodate the twin goals of encouraging bargained-for pleas of guilty to lesser offenses and, at the same time, discouraging overly lenient sentences for persons who are charged in an indictment with armed felonies. The statute permits the sentencing court to impose, under certain guidelines, upon a defendant charged in the indictment with an armed felony, but who obtains the privilege of pleading guilty to a class D violent felony, any sentence that it could have imposed on an individual who stands convicted of a class D violent felony and was not indicted for an armed felony. Subdivisions (b) and (c), which set forth the guidelines for the imposition of a lesser sentence, do not constitute a new charge or equivalent separate criminal proceeding. Penal Law § 70.02(5) does not violate due process of law.

The judgment, convicting defendant of attempted robbery in the second degree and sentencing him to an indeterminate term of imprisonment of one to three years should be affirmed.

SULLIVAN, J. (dissenting)

I do not believe that the sentence imposed herein may be sustained by an appellate exercise, de novo, of the full scope of sentencing discretion from which the trial court believed itself foreclosed. A review of the record reveals that the court, unable to find any of the mitigating circumstances enumerated in Penal Law §70.02[5](b), found itself obliged to impose, as promised, the minimum indeterminate sentence mandated by subdivision [5](a) of the same section:

> I cannot find mitigating circumstances in this case because there is nothing in connection with the defendant's participation in this crime that mitigates, in any way, his personal deportment. His deportment since then is not to be considered a mitigating circumstance. Therefore, I cannot do it. I have ruled on it in any event.

Thus, the court, precluded by section 70.02[5] from an unfettered review of all of the factors relevant to a sentence, including defendant's personal background, did not even attempt to justify its sentence as a product of the exercise of discretion.

Moreover, except for a fallback position that the sentencing court abused its discretion in failing to find mitigating circumstances under Penal Law §70.02[5](b), an argument without merit, the only issue raised on appeal is the constitutionality of section 70.02[5](a), pursuant to the mandatory terms of which defendant was sentenced. Thus, by sanctioning the sentence imposed here upon an appellate

review which goes beyond the factors actually considered by the sentencing court and upon an issue never presented on appeal, defendant is, in my view, effectively being denied the right to be heard both at sentence and on appeal. I do not believe that the constitutional issue can be avoided, and I would find Penal Law §70.02[5]* unconstitutional.

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* Insofar as is relevant Penal Law §70.02[5] provides:

(a) Except as provided in paragraph (b) of this section, where a plea of guilty to a class D violent felony offense is entered pursuant to section 220.10 or 220.30 of the criminal procedure law in satisfaction of an indictment charging the defendant with an armed felony, as defined in subdivision forty-one of section 1.20 of the criminal procedure law, the court must impose an indeterminate sentence of imprisonment pursuant to section 70.00.

(b) In any case in which the provisions of paragraph (a) hereof ... apply, the court may impose a sentence other than an indeterminate sentence of imprisonment ... if it finds that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the defendant's commission of an armed felony.

(c) The defendant and the district attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) hereof, and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that an indeterminate sentence of imprisonment should not be imposed pursuant to the provisions of such paragraph (b) it shall make a statement on the record of the facts and circumstances upon which such determination is based. A transcript of the court's statement, which shall set forth the recommendation of the district attorney, shall be forwarded to the state division of criminal justice services along with a copy of the accusatory instrument.

Defendant was charged with robbery in the first degree (using or threatening the immediate use of a dangerous instrument, to wit, a knife), robbery in the second degree (displaying what appeared to be a pistol) as an armed felony, and related offenses arising out of a January 18, 1979 incident in which, while allegedly displaying both a knife and what appeared to be a pistol, he stole a "Grateful Dead" button from one Sam Rohm on a subway train. Eventually, he pleaded guilty to attempted robbery in the second degree, a class D violent felony offense, under the first count, which charged him with robbery in the first degree predicated upon the use or threatened use of a knife.* The use or threatened use of a knife in a robbery does not constitute an armed felony offense. (CPL 1.20 [4].)

The plea was entered pursuant to CPL §220.10[5](d)(ii), which permits an accused who is charged with a class B or C violent felony offense, to plead, with the prosecutor's consent, to a lesser crime, provided he pleads guilty to at least a class D violent felony offense. Section 70.02[5] of the Penal Law, however, provides that where such a plea is entered in satisfaction of an indictment charging an armed felony offense, the court, in the absence of a finding of mitigating circumstances having to do with the commission of the crime, must impose an indeterminate term of imprisonment. If the court does find such mitigating circumstances it may impose a sentence more lenient than the otherwise mandated minimum term of one to three years. At the plea the court explained that because the second count of the indictment charged an armed

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* Indeed, attempted robbery in the second degree (Penal Law §§ 110.00, 160.10) is not a lesser included offense of robbery in the first degree predicated upon the use or threatened use of a dangerous instrument. (See CPL 1.20[37]; Penal Law 160.15[3].) Actually, in pleading to an attempted robbery in the second degree, defendant admitted facts sufficient to constitute robbery in the first degree committed by the use or threatened use of a dangerous instrument, i.e., a knife (Penal Law 160.15[3]).

felony an indeterminate sentence of a least one to three years was mandated, although it would consider "an application for lesser sentence due to mitigating circumstances ... and review it carefully in conjunction with the probation investigation report..." The court promised that in any event the sentence would not exceed a term of one to three years.

On defendant's subsequent application the court was unable to find mitigating circumstances, and also rejected defendant's constitutional challenge that section 70.02[5] of the Penal Law violates due process because it mandates a minimum indeterminate sentence upon the basis of an unsustained charge and thereby precludes judicial consideration of a more lenient sentence alternative which would have been available if he had not been charged with an armed felony. But for the provisions of Penal Law §70.02[5] defendant could have received a definite term sentence of one year or less, probation, or a conditional or even unconditional discharge.

In sentencing defendant to the promised term of one to three years, the court found "nothing in connection with the defendant's participation in this crime that mitigates, in any way, his personal deportment", and refused counsel's entreaties to consider certain "changes" in defendant's life since his arrest on the instant charges; that no one was injured during the commission of the crime involved, and that defendant had been born brain-damaged.

In enacting Penal Law §70.02[5] the legislature chose to limit plea bargaining in instances where a defendant is charged with an armed felony by restricting the sentencing options available when such a defendant pleads guilty to a class D violent felony. No doubt the legislature, which might well have chosen to disallow plea bargaining altogether

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in such situations, was concerned that without such a restriction on a court's sentencing prerogatives defendants charged with an armed felony who enter pleas to a lesser crime might receive overly lenient sentences. Certainly, a defendant does not have a constitutional right to a plea to a lesser charge in satisfaction of a more serious one. A plea to a lesser crime is a "matter of grace [to which] reasonable conditions may be attached ..." (People v. Esalerre, 35 NY2d 463, 467; see, also, People v. Elliby, 80 AD2d 875, lv. to app. den. 53 NY2d 942), and, as the People correctly note, a legislative distinction in the treatment accorded those who are charged with an armed felony offense and those who are not is rational. (See People v. Drayton, 39 NY2d 580, 585.) The issue before us, however, is not whether Penal Law §70.02[5] makes a rational distinction between classes, but rather, whether the statute offends due process by eliminating sentencing alternatives otherwise available and mandating the imposition of an indeterminate sentence, merely because the indictment includes as one of the charges an armed felony offense. Of course, if section 70.02[5] were to provide for the disqualification of a defendant from lenient sentencing alternatives upon the basis of the crime of conviction, such a procedure, though perhaps not an ideal method for the exclusion of unworthy offenders, would withstand constitutional scrutiny since the legislature has the power to impose mandatory sentencing upon any crime it so chooses, thereby limiting or even completely eradicating judicial discretion. (See, e.g., People v. Broadie, 37 NY2d 100, 117; People v. McKay, 21 AD2d 142.)

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It is fundamental that while a defendant can be punished for the crime to which he pleads guilty, he cannot be punished for acts which have been neither admitted nor proven. Since Penal Law §70.02[5] precludes the imposition of a more favorable sentence which would otherwise be available, its effect is to impose increased punishment on the basis of an act charged, but unproven. In this respect section 70.02[5] is, I believe, fundamentally unfair and violative of due process. It is especially pernicious where, as here, a defendant pleads to a crime which is not even a species of armed felony. As already noted, the plea was entered under the first degree robbery charge predicated on the use or threatened use of a knife, which crime is not an armed felony offense.

The preclusion of more favorable sentencing alternatives on the basis of an unproven charge, rather than on the crime sustained by conviction, was found to be violative of due process in People v. Drummond (40 NY2d 990, cert. den. 431 U.S. 908). The issue there was the constitutionality of former CPL §70.10[2], which eliminated from youthful offender consideration any otherwise eligible youth merely because the indictment contained a charge which constituted a class A felony. The Court of Appeals held that the total exclusion of defendants indicted for class A felonies violated due process because it made "the privileged penal sanction to be imposed depend solely upon an accusation, however formal, rather than adjudication, however informal, in the adversarial criminal process." (Id at 992.) In so holding the court relied upon the reasons stated in the dissenting opinion of Justice Samuel Rabin at the Appellate Division (sub nom People v. Santiago, 51 AD2d, at pp. 14-16):

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> By according a decisive role in the determination of which youths are eligible for youthful offender treatment to nothing more substantial than a written statement of unproven allegations (see CPL 1.20, subd. 3), the statute offends reasonable notions of fairness. (Id at 15.)

Here, the sentencing court, recognizing that an indictment-based exclusion violates due process, distinguished Penal Law §70.02[5] from the statute in Drummond on the ground that section 70.02[5](b) contains an "escape hatch", which, by allowing a defendant to demonstrate affirmatively that his conduct does not "rise to that of an armed felon", saves it from constitutional infirmity. Subdivision 5(c) of section 70.02 permits the defendant and the prosecutor to present "relevant information to assist the court in making a determination" whether any of the three factors specified in subdivision 5(b) exist.

The difficulty with this argument is that even the review under subdivision 5(b) is geared to the crime charged, not the crime of which defendant has been convicted. The legislature may not premise any action upon unsustained charges once an adjudication has been made. Once a defendant is convicted, the indictment becomes meaningless. As the Court of Appeals has noted:

> [The defendant's] plea only admits the facts stated in the plea as constituting the lesser crime .... This was quite different from pleading guilty to an indictment and gave no warrant to the court to conduct an inquiry to ascertain whether the facts alleged in the indictment were true or whether if the acts described in the indictment were committed, the person who did so was armed. (People v. Griffin, 7 NY2d 511, 515.)

In Griffin, a defendant charged with armed assault pleaded guilty to the lesser offense of attempted unarmed assault.

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The plea colloquy did not contain any admission by the defendant that he had been armed. Nevertheless, at sentencing, the court conducted a trial-like inquiry, determined that he had in fact been armed, and applied the enhanced punishment statute then governing persons who committed felonies while armed. (See former Penal Law §1944.) The court held that since it could not be assumed from the plea admissions to the lesser charge that the defendant was armed, the post adjudication inquiry was not permissible:

> The charges in the indictment cannot be tried after a plea to a lesser crime has been interposed, which stands as a barrier even where the inquiry discloses that an actual [crime] has been committed and not merely an attempt. (Id at 516.)

Of course it is true, as pointed out by the People, that defendant, having been promised the minimum indeterminate term of one to three years, in the absence of a finding of mitigating circumstances, could not have been misled as to his sentence as the defendant in Griffin might have been. Nor was he surprised by the inquiry as to whether mitigating circumstances existed since the procedure followed was precisely what the statutory scheme contemplated, and it was he who initiated the inquiry. But even were it permissible in such circumstances for an indictment to have some effect after a plea of guilty, section 70.02[5] would still offend due process because it required enhanced punishment without requiring the People to make any additional showing. The statute thus impermissibly placed upon defendant the burden of extricating himself from an enhanced sentence. Even though section 70.02[5](c) does not specify where the burden

of proof lies,* its practical effect is to place the burden of going forward and of persuasion on a defendant because, in the absence of any mitigating circumstances, the court cannot consider a more lenient sentence alternative and must impose an indeterminate sentence. Thus, the statute creates a presumption, albeit rebuttable, that one who is accused of an armed felony but pleads only to a violent felony offense has, in fact, committed a crime involving the use of a firearm, by virtue of which he is disqualified from more favorable sentencing treatment.

While it is within the state's power to regulate its procedures, it may not do so if "it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked fundamental." (Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105.) It "is not within the province of a legislature to declare an accused guilty or presumptively guilty of a crime." (McFarland v. American Sugar Refinery Co., 241 U.S. 79, 86.) The legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." (Tot v. U.S., 319 U.S. 463, 469.)

Concededly, courts have always considered the guilt determination process differently from sentencing. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." (Williams v. New York, 337 U.S. 241, 251.) Thus,

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* Compare CPL §§ 400.15[7](a), 400.20[5], 400.21[7](a) which provide the procedure for post-conviction proceedings to determine whether a defendant is subject to enhanced punishment as a recidivist. In these proceedings the burden of proof is upon the People.

in passing sentence, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." (United States v. Grayson, 438 U.S. 41, 50; see, also, Roberts v. United States, 445 U.S. 552.) But in the usual sentencing situation judicial discretion in the consideration of the nature and circumstances of the crime turns on facts as to which guilt has already been established. Under Penal Law §70.02[5], however, enhanced punishment is mandated on the basis of an unproven charge, unless the court finds mitigating circumstances relative to the manner in which the crime was committed, the defendant's participation therein or the strength of the People's case. In fact, should the court determine not to impose an indeterminate sentence, it is required to make a statement of the facts and circumstances upon which its determination is based. (Penal Law §70.02[5](c).) Thus, in determining whether to extend leniency and impose a non-indeterminate sentence, the court is engaged in a post-conviction fact finding process. When a sentencing procedure requires that facts not established by the conviction be considered so that sentence might be enhanced, a defendant is entitled to all the protections guaranteed by due process. (See Specht v. Patterson, 386 U.S. 547, 608-610.)

In Specht petitioner had been convicted for indecent liberties under a Colorado statute that carried a maximum sentence of ten years. After a psychiatric examination and the furnishing of a complete report to the sentencing court in full compliance with the governing statute, petitioner was sentenced, not pursuant to the statute under which he

APPEAL NO. 12331 CONTINUED

was convicted, but under another, the Sex Offenders Act. He was not afforded a hearing or right of confrontation. In holding that due process protections apply to a sentencing procedure which contemplates the consideration of factual allegations not established by the conviction so that sentence might be enhanced, the court quoted U.S. ex. rel. Gerchman v. Maroney, 355 F.2d 302, 312:

> It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirement of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such proceedings is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial .... (Id at 609.)

A basic safeguard of due process is that the prosecution bear the burden of proof. "'Due process commands that no man shall lose his liberty unless the Government has borne the burden of ... convincing the fact finder of his guilt.' To this end the reasonable doubt standard is indispensable....." (In re Winship, 397 U.S. 358, 363, citing Speiser v. Randall, 357 U.S. 513, 526.)

Penal Law §70.02[5] fails to pass constitutional muster because it requires that a defendant be subjected to enhanced punishment on the basis of an unproven charge, without requiring the People to make any additional showing, thus impermissibly placing upon the defendant the burden of extricating himself from the enhanced sentence. This violates due process of law.

Accordingly, the judgment should be modified, on the law, to the extent of reversing it with respect to the sentence and, except as thus modified, it should be affirmed and the matter remanded to Trial Term for resentencing.

APPENDIX C

Decision and Order
of the Supreme Court,
New York County

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK	Ind. No. 282/79
-against-	DECISION AND ORDER
DAVID FELIX,	
defendant.	

The defendant was indicted on charges of robbery in the first degree, robbery in the second degree as an armed felony, attempted robbery in the first degree, and two counts of criminal possession of a weapon in the fourth degree.

On October 19, 1979 the defendant pleaded guilty to attempted robbery in the second degree under the first count of the Indictment, in satisfaction of the entire Indictment, and the defendant was promised a sentence of not less than one and no more than three years in a New York State penitentiary.

On January 30, 1980, the defense counsel submitted to the Court a presentence memorandum, setting forth certain mitigating circumstances in an attempt to convince the Court to impose a sentence other than an indeterminate sentence of imprisonment. After a consideration of the memorandum, with reference to the factors set forth under Penal Law Section 70.02, subdivision 5(b), the Court found insufficient mitigating circumstances and denied the defendant's motion.

The defendant has now submitted a memorandum seeking to have this Court declare unconstitutional Penal Law Section 70.02, subdivision 5(a) on the grounds that the mandatory sentencing provisions of said Section are violative of the due process clause of the Fourteenth Amendment of the United States Constitution.

In 1978 the Legislature, confronted with an alarming increase in crimes committed with the use of firearms, enacted the present Penal Law Section 70.02. This statute, along with Penal Law Section 1.20(41) created a new category of crime -- the "armed felony offense" -- and imposed certain plea bargaining and sentencing restrictions on those individuals who were indicted for the crimes involving the use of handguns. Briefly, a person indicted for an armed felony offense would have to plead guilty to a "violent felony offense" and would face greater prison time as a result, as well as be subject to certain other penalties if a predicate felony status existed (see Penal Law Section 70.04). Furthermore, if a defendant entered a plea

to a "D" violent felony offense in satisfaction of an armed violent felony, the defendant would have to receive a minimum state prison term of not less than one nor more than three years, unless the Court found certain mitigating circumstances set out under Penal Law Section 70.02, subdivision 5(b). It is this last Section that this defendant now attacks, claiming that this Section creates an indictment-based exclusion in the sentencing of certain felony offenders; that is, the provision of the statute which mandates an indeterminate sentence for those offenders who plead guilty to a "D" violent felony in satisfaction of an Indictment charging an armed felony creates a situation in which sentencing is dependent solely upon the Indictment, rather than a formal adjudication of guilt. In support of this proposition, the defendant cites People v. Drummond, 40 NY 2d 990, and People v. Brian R., 78 Misc 2d 616, aff'd. 47 AD 2d 599. In Drummond, the Court of Appeals declared unconstitutional on due process grounds a statute which excluded from discretionary youthful offender treatment all youths charged with Class "A" felonies. The Court reasoned that conditioning eligibility on the highest count of an Indictment makes "the privileged penal sanctions to be imposed depend solely upon an accusation, however formal, rather than an adjudication, however informal, in the adversarial criminal process" (40 NY 2d at 992). In People v. Brian R., Justice Polsky considered the same statute and held it unconstitutional using an equal protection rationale. In Justice Polsky's words:

> There is, and can be no rational basis for treating differently youths who have been convicted of the same offense merely because one of them had originally been charged with a higher grade of offense. The restriction or classification based upon the charge made in the indictment rather than the charge proven in Court is utterly capricious and irrational. (78 Misc 2d at 619-620)

However, in both these instances the statute in question created an absolute exclusion; once it was determined that a count in the Indictment charged a Class "A" felony, the indicted youth automatically became ineligible for youthful offender treatment. In the instant statute, the indictment of an individual for an armed felony does not automatically exclude such individual from the usual alternatives to a state prison sentence under a plea to a "D" violent felony, but rather limits the judge's discretionary power to grant such alternatives by establishing certain guidelines and conditions. Thus, under Penal Law Section 70.02, subdivision 5(b), the mitigating circumstances are enumerated as follows:

> ...(i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosection; or (iii) possible deficiencies in proof of the defendant's commission of an armed felony. (Penal Law Section 70.02, subd. 5(b))

The deciding difference in this statute, then, is these three exceptions which allow the Court much of its usual sentencing discretion regardless of the top count of the Indictment. Thus, the statute as read in its entirety insures that those individuals whose conduct does not rise to that of an armed felon, or is otherwise not the egregious conduct contemplated by the Legislature, are granted reprieve from the harsher sentencing guidelines, while at the same time guaranteeing that the legitimate legislative intent is carried out by mandating state prison time for persons convicted of crimes involving the use of firearms.

For the above-stated reasons, this Court finds that the challenged statute does not create an indictment-based exclusion violative of the defendant's due process or equal protection rights, and the defendant's motion to invalidate the statute is denied.

Dated: New York, New York

August 28, 1980

Norman B. Fitzer

NORMAN B. FITZER

Supreme Court Justice

APPENDIX D

Sentence Minutes

Sentence

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS : CRIMINAL TERM : PART 80

- x

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

DAVID FELIX, : Ind. # 282/79

Defendant. :

- x

August 28, 1980.

100 Centre Street,
New York, New York.

B E F O R E :

HONORABLE NORMAN B. FITTER, Justice.

A P P E A R A N C E S :

SARAH HINES, ESQ.,
Assistant District Attorney,
Attorney for the People.

HYMAN KLEINSTEIN, ESQ.,
Attorney for the Defendant.

Bonnie Fitzsimmons, CSR,
Official Court Reporter.

THE CLERK: On the sentence calendar, Indictment number 282 of 1979, David Felix.

MR. KLEINSTEIN: The defendant is ready for sentence.

THE COURT: A decision was filed. Do you have a copy?

MR. KLEINSTEIN: I have not yet received one.

MS. HINES: I would like a copy, too.

THE COURT: Please give defense counsel and the District Attorney a copy.

MS. HINES: The People's response was served earlier today.

MR. KLEINSTEIN: Your Honor, I have read the pertinent part, and I respectfully except.

THE COURT: You are entitled.

Arraign the defendant for sentence.

THE CLERK: Is your name David Felix?

THE DEFENDANT: Yes.

THE CLERK: Is Mr. Kleinstein, present in court, your attorney?

THE DEFENDANT: Yes.

THE CLERK: You are now being arraigned for sentence under Indictment number 282 of 1979 on your plea of guilty to the crime of attempted robbery in

the second degree.

You and your attorney each have the right to address the Court before the imposition of sentence, after the District Attorney has had an opportunity to be heard.

MS. HINES: Your Honor, I understand that this was a negotiated plea, and it is a disposition where the plea bargaining gives the Court sufficient latitude in sentencing the defendant consistent with the seriousness of the crime.

THE COURT: Well, this is a class D felony that mandates a particular minimum, and I agree with much of what you say, but not all.

Is there something you wish to say, Counsel?

MR. KLEINSTEIN: Yes, I do, your Honor, very much. Your Honor, I would ask you at this time to reconsider my memorandum with regard to my contention, your Honor, that there are mitigating circumstances in this case.

Just to bring this defendant up to date in this regard, your Honor, you know that this crime was committed on January 17, 1979. Since then, there have been a lot of changes in this young man's personality and habits. He has a woman with whom he lives, and the have a four-month old child. He is working.

The defendant, as you know, is a brain-damaged child to begin with, and the crime itself is one in which there was no injury of any kind. I don't want to belabor this point, your Honor, but I just want to say this: I spoke to his mother this morning, who couldn't be here today, and the family has had a terrible tragedy. Their 22-year-old daughter died within the past month.

Your Honor, I would ask this: I have gotten to know not only this young man but also his family, and they are very fine, law-abiding people. His father is a seaman, and spends a great deal of time out of the home. Nevertheless, the defendant comes from an intact home.

I feel that this young man has learned his lesson in that it is almost two years that he has gone through this, and it has been terrible, punishment enough. Your Honor, I would ask you at this time to reconsider my argument as to mitigating circumstances, and respectfully ask that you find mitigating circumstances, and that you sentence this young man to the City penitentiary rather than to State prison.

MS. HINES: Your Honor, the People certainly oppose that. This was a knife-point robbery where an

imitation gun was displayed. The victim resisted. The defendant followed him, went through his coat pockets, after having forced him off a subway train and behind a candy stand.

This is the defendant's fourth arrest, and three of the four involved robbery charges. He was sentenced to five years' probation on a robbery case that began in December of 1976, and I believe he was still on probation at the time he committed the instant offense.

We think, in view of the seriousness of the charges and the fact that a knife was displayed and an imitation gun was displayed and recovered, as well as his past record, that a State prison term is indicated.

THE COURT: I cannot find mitigating circumstances in this case because there is nothing in connection with the defendant's participation in this crime that mitigates, in any way, his personal deportment. His deportment since then is not to be considered a mitigating circumstance. Therefore, I cannot do it. I have ruled on it in any event.

MR. KLEINSTEIN: I ask you that you reconsider your decision with regard to the Constitutionality of the statute.

THE COURT: I have given that a lot of thought,

Mr. Felix, is there anything you wish to say on your own behalf before sentence is imposed?

MR. KLEINSTEIN: The defendant tells me he does not. He's not very articulate. I don't know if he can express his feelings.

THE COURT: You are sentenced to serve a term of not less than one year or more than three years in an institution of the New York State Department of Corrections.

THE CLERK: David Felix, if you wish to appeal the sentence of this Court, you must file a notice of appeal within thirty days of this date. If you do not have the funds to hire a lawyer, the court will assign a lawyer to you.

Let the record reflect that the defendant has received written notice of his right to appeal.

* * * * *

APPENDIX E

Plea Minutes

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK PART 70

THE PEOPLE OF THE STATE OF NEW YORK : Ind. No. 282/79

-vs- CHARGE: Robb. 1.

DAVID FELIX, : P L E A

Defendant.

October 19th, 1979
100 Centre Street
New York, N. Y.

B E F O R E :

HONORABLE NORMAN B FITZER, J.S.C.

A P P E A R A N C E S :

HON. ROBERT MORGENTHAU
District Attorney
New York County
For the People
BY: KIM HOGREFE,
Assistant Dsitrict Attorney

OFFICE OF LEON POLSKY
THE LEGAL AID SOCIETY
New York County
For the Defendant
BY: HYMAN FEINSTEIN,
Of Counsel

GLENN GREENSPAN
Official Court Reporter

THE CLERK: Line thirteen, David Felix.

MR. FEINSTEIN: Leon Polsky by Eyman Feinstein. I think we can step up now.

(WHEREUPON, there was a sidebar discussion.)

MR. FEINSTEIN: Your Honor, as you well know, this case has been in the court since February — January, as a matter of fact, of '79 and I've had many conferences with the defendant and with his family, his mother and father, and at this time I've been authorized by the defendant to withdraw his plea of not guilty and now the defendant offers to plead guilty underthe second count of the indictment — your Honor, I'd rather plead under the first count of the indictment.

MR. HODGEFE: May we approach?

(WHEREUPON, there was a sidebar discussion.)

MR. FEINSTEIN: Your Honor, just to correct what I just said, the defendant pleads guilty under the first count of the indictment rather than under the second; under the first count of the indictment to a lesser included charge of attempted robbery in the second degree, a D felony.

MR. HODGEFE: Yes, your Honor, it's my understand-

ing this plea would be to an attempt robber in the second degree as a violent felony offense in satisfaction to the indictment which charged an armed violent felony offense.

In light of the plea negotiations which have been entered into, the People feel a plea to a class D violent felony affords the Court sufficient scope at the time of sentence and the People therefore recommend acceptance of the defendant's plea of guilty.

THE COURT: For the reasons stated by the assistant district attorney which I believe are valid and proper reasons for considering the acceptance of the lesser plea in this case, the Court will give the application of counsel that consideration.

Before I do, however, David Felix, your attorney has offered to enter a plea of guilty on your behalf to the crime of attempted robbery in the second degree, as a violent felony under an indictment charging you with an armed violent felony; the plea to be in full satisfaction of the

indictment and the plea being under the first count of the indictment as a lesser included count.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Before the plea is accepted by the Court I must advise you you have certain rights that would be affected by the entry of the plea of guilty in this case. First of all, you have the right to a jury trial in your case if you wish it and then if you had a trial in your case --

Counsellor, if you can't hear, have him come up to the bench -- to the table.

I just finished telling you you're entitled to a jury trial in this case if you wish. You would have a chance in that case during the course of trial to confront the witnesses who might be called to testify against you during the trial and that would mean you would be in the courtroom during the trial and you can see and hear the witnesses when they testified and they can see you when they testified.

You would also have a right to cross examine

those witnesses through your attorney and yourself if you wish after their direct testimony was given.

In addition to that, you have a constitutional right and privilege against self-incrimination that would be effective during the trial and that would mean you would not have to take the witness stand and testify during the course of the trial of the case against yourself unless you wanted to do so. You could have if you wanted to, but you wouldn't have to if you didn't want to.

You don't have to enter a plea of guilty today if you don't want to and you don't have to admit the violation of law unless you want to. If the plea is entered and accepted by the Court you would give up the rights I just told you about because you would end the trial part of the case with this plea of guilty.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: I will also explain to you that a class D felony under this indictment which carges an armed violent felony in the second count, even though

your plea is to a single violent felony as a class D, attempt robbery in the second degree, would require the Court to impose as a minimum sentence no less than one, no more than three years in states prison as a minimum sentence.

It could be as high as seven years in state prison or something in between one year and seven years -- in between three years rather.

I will tell you that I promised your attorney and I promise you now on the record that if the plea is entered and accepted by the Court the sentence of the Court would in fact be a sentence of no less than one, no more than three years in an institution in the New York State Department of Corrections. I will also tell you if your attorney makes an application for lesser sentence due to mitigating circumstances, I will consider that application and review it carefully in conjunction with the probation investigation report, but I do not promise I make a lesser sentence. It would depend upon the circumstances and the probation report and my opinion and judgment after reveiwing.

Do you understand?

THE DEFENDANT: Yes, yes.

THE COURT: I will also tell you if you had a previous felony conviction within the past ten years or had served time on one within the past ten years, then the Court would have to impose a different sentence. In that case it would be at least a sentence of no less than two, no more than four years and could be as high as three and a half to seven years in state prison or something in between those figures.

If you had a previous violent felony offense, The Court would -- in the past ten years and served time and the Court would have to impose a prison term of no less than two and a half, no more than five years in state prison and could be as high as three and a half to seven.

I tell you that because I'm required to tell you about that rule and I will also explain to you that I understand you have no previous felony convictions so those rules don't apply to you in this instance.

Do you understand that also?

THE DEFENDANT: Yes.

THE COURT: I will also have to explain to you if the plea is entered and accepted by the Court you would stand guilty of a violent felony crime and that would have this additional effect. It would mean if during the next ten years or ten years after the time you serve on this case, if you serve any time on it, you should commit another felony crime and thereafter be convicted of the crime, the sentencing court on the new case whether it was an armed felony or an ordinary felony or violent felony or ordinary felony would have to impose a prison term and the prison term would be greater because of today's conviction of a felony.

Do you understand that also?

THE DEFENDANT: Yes.

THE COURT: Now, except for the promise I made to you of the sentence of one to three years and that also if your attorney makes an application for a lesser sentence due to mitigating circumstances, I would consider it along with all the other factors

in the case, except for that promise, any other promises been made by this Court or your attorney or the district attorney to induce you to enter this plea of guilty?

THE DEFENDANT: No.

THE COURT: Do you now admit to this Court that you did in the city and county of New York on January 18th, 1979 forcibly steal or take some property from Sam Mohn, M-o-h-n, and during the commission of the taking of that property or your flight from that you used or threatened the immediate use of a knife?

THE DEFENDANT: Yes.

THE COURT: Where did that happen?

THE DEFENDANT: 86th.

THE COURT: I know it was in the city and county of New York, but where in Manhattan? What street or what area?

THE DEFENDANT: Broadway.

THE COURT: Broadway and what?

THE DEFENDANT: The subway, 86th Street.

THE COURT: And was it down in the subway that

this occurred?

THE DEFENDANT: Yes.

THE COURT: And do you recall -- can you tell me what you took from him?

THE DEFENDANT: A little button.

THE COURT: And what did it say on the button?

THE DEFENDANT: Grateful Dead.

THE COURT: The Court will accept the plea.

THE CLERK: David Felix, is that your name? And your attorney is present in court with you? You now withdraw your previously plea of not guilty that you entered to this indictment and now plead guilty to the attempted robbery in the second degree under the first count of the indictment to cover the felony, a D felony; is that your plea?

THE DEFENDANT: Yes.

THE COURT: January 11th, 1980 for sentence.

oOo

CERTIFIED TO BE A TRUE & ACCURATE TRANSCRIPT.

GLENN Greenspan
Official Court Reporter

APPENDIX F

Notice of Appeal

COURT OF APPEALS
STATE OF NEW YORK

- x

PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- :

DAVID FELIX, :

Defendant-Appellant. :

- x

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that DAVID FELIX, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final Order of the Court of Appeals of the State of New York affirming the judgment of conviction, entered herein on February 15, 1983.

This appeal is taken pursuant to 29 U.S.C. §1257(2).

Michele Maxian

By: Michele Maxian

Caesar D. Cirigliano, Esq.
Attorney for Appellant
The Legal Aid Society
15 Park Row, 10th Floor
New York, NY 10038

Supreme Court, U.S.
FILED
JUN 27 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-6732

DAVID FELIX,

Appellant,

-against-

STATE OF NEW YORK,

Appellee.

On Appeal From the Court of Appeals of New York

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-6732

DAVID FELIX,

Appellant,

-against-

STATE OF NEW YORK,

Appellee.

On Appeal From the Court of Appeals of New York

MOTION TO DISMISS OR AFFIRM

INTRODUCTION

Appellant David Felix pleaded guilty to a class D violent felony offense in satisfaction of an indictment charging him with an armed violent felony. Because Felix was initially indicted for an armed violent felony but negotiated a plea to a lesser charge, Section 70.02(5) of the New York Penal Law (McKinney Supp. 1982) required that he serve at least one to three years in prison as a condition of that plea bargain, unless the court found one of three specified mitigating circumstances about the nature of the crime. On appeal to this Court, Felix

asserts that the New York Court of Appeals incorrectly ruled that the statute did not deprive him of due process of law under the Fourteenth Amendment to the United States Constitution.

The appellee moves to dismiss this appeal or, in the alternative, to affirm the judgment of the New York Court of Appeals, on the ground that it is manifest that the question is so insubstantial as not to warrant further argument.

PRELIMINARY STATEMENT

On October 19, 1979, appellant David Felix was convicted in the Supreme Court of the State of New York, New York County (Fitzer, J.), upon his plea of guilty, of Attempted Robbery in the Second Degree [N.Y. Penal Law §§110/160.10 (McKinney 1975)]. He was sentenced on August 28, 1980, to an indeterminate prison term of from one to three years. On March 16, 1982, the New York Supreme Court, Appellate Division affirmed the conviction. People v. Felix, 87 A.D.2d 529 (1st Dept.), leave to appeal granted, 56 N.Y. 2d 656 (1982). On February 15, 1983, the New York Court of Appeals (with one judge dissenting) affirmed the conviction. People v. Felix, 58 N.Y.2d 156 (1983). Defendant has served his prison term and been released on parole.

THE STATE STATUTE INVOLVED

This appeal concerns the constitutionality of Section 70.02(5) of the New York Penal Law, which governs plea and sentence bargaining for defendants charged in an indictment with an armed violent felony. An "armed" felony is defined as a violent felony aggravated by the

use or display of what is or appears to be a firearm. N.Y. Criminal Procedure Law §1.20(41) (McKinney 1981). Subsection (a) of the statute provides that the sentencing judge must ordinarily impose an indeterminate sentence of imprisonment on the plea-bargaining defendant. Subsection (b), however, permits a judge, in his discretion, to sentence the defendant to a lesser sentence, including probation, if there exists any one of three specific mitigating factors concerning the way the crime was committed. Subsection (c) provides the mechanism for determining whether any of the mitigating factors exist in a particular case. Under that subsection, either the defendant or the district attorney may present any relevant information to the court, which may then conduct a hearing on the issue.

Penal Law Section §70.02(5) reads in full:

> (a) Except as provided in paragraph (b) of this section, where a plea of guilty to a class D violent felony offense is entered pursuant to section 220.10 or 220.30 of the criminal procedure law in satisfaction of an indictment charging the defendant with an armed felony as defined in subdivision forty-one of section 1.20 of the criminal procedure law, the court must impose an indeterminate sentence of imprisonment pursuant to section 70.00.
>
> (b) In any case in which the provisions of paragraph (a) hereof or the provision of subparagraph (ii) of paragraph (c) of subdivision two of this section apply, the court may impose a sentence other than an indeterminate sentence of imprisonment, or a definite sentence of imprisonment for a period of no less than one year, if it finds that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the

> defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution; or (iii) possible deficiencies in proof of the defendant's commission of an armed felony.
>
> (c) The defendant and the districct attorney shall have an opportunity to present relevant information to assist the court in making a determination pursuant to paragraph (b) hereof, and the court may, in its discretion, conduct a hearing with respect to any issue bearing upon such determination. If the court determines that an indeterminate sentence of imprisonment should not be imposed pursuant to the provisions of such paragraph (b), it shall make a statement on the record of the facts andd circumstances upon which such determination is based. A transcript of the court's statement, which shall set forth the recommendation of the district attorney, shall be forwarded to the state division of criminal justice services along with a copy of the accusatory instrument.

STATEMENT OF THE CASE

On January 18, 1979, appellant forced Sam Rohm onto a subway train at 86th Street in Manhattan by displaying both a knife and what appeared to be a pistol and threatening Rohm with physical injury. While on the train, appellant stole a "Grateful Dead" button from Rohm. Appellant then forced Rohm off the train at the 42nd Street station, and was searching Rohm's pockets when the police arrested him. The stolen button, the knife and the imitation pistol were recovered from appellant. In an indictment filed on January 23, 1979, appellant was charged with Robbery in the First Degree (with a knife) [N.Y. Penal Law §160.15(3)(McKinney 1975)], Robbery in the Second Degree (displaying what appeared to be a pistol) as an Armed Felony [N.Y. Penal Law §160.10(2)(b)(McKinney 1975)], Attempted Robbery in

the First Degree [N.Y. Penal Law §§110/160.15(3) (McKinney 1975)], and two counts of Criminal Possession of a Weapon in the Fourth Degree [N.Y. Penal Law §265.01(McKinney 1980)]. Indictment No. 282/79.

On October 19, 1979, appellant offered to plead guilty to Attempted Robbery in the Second Degree in satisfaction of the entire indictment (Plea: A50-51).* The court explained to appellant that he was offering to plead guilty to a class D violent felony offense and that, because the indictment charged an armed felony, a sentence of at least one to three years in state prison was required. The court promised, however, that it would consider any application for a lesser sentence due to mitigating circumstances, but would not promise to impose a lesser sentence (Plea: A52-54). Appellant replied that he understood the terms of his negotiated plea (Plea: A55-57). He then admitted that on January 18, 1979, he had forcibly stolen a "Grateful Dead" button at knifepoint from Sam Rohm in the subway at Broadway and 86th Street (Plea: A57-58).

On January 30, 1980, appellant presented a written memorandum, asking the court to find "mitigating circumstances" pursuant to Section 70.02(5)(b) of the New York Penal Law and to impose more lenient punishment than the state prison sentence otherwise mandated. The court found "insufficient mitigating circumstances" and denied the request on February 22, 1980 (see Decision: A40). In June of 1980, appellant asked the court to hold that Penal Law Section 70.02(5) violated due process of law under the State and Federal constitutions. In a written

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*Numbers preceded by "A" refer to Appellant's Appendix; those preceded by "JS" refer to Appellant's Jurisdictional Statement.

decision dated August 28, 1980, the court found that the statute does not "automatically exclude" an individual who has been indicted for an armed felony from the "usual alternatives to a state prison sentence under a plea to a 'D' violent felony." Rather, the statute simply establishes "certain guidelines and conditions" for the court's exercise of its power to impose an alternative sentence (Decision: A40-42). The court therefore concluded the statute was constitutional.

On August 28, 1980, appellant once again asked the sentencing court to find "mitigating circumstances" because of appellant's family history and the fact that nobody was injured during the commission of the crime (Sentence: A45-46). The prosecutor noted that this was appellant's fourth arrest and third robbery arrest, and that he was on probation on a robbery case when he committed this crime (Sentence: A46-47). The court stood by its previous decision that no relevant mitigating factors existed, and refused to reconsider its decision that Section 70.02(5) of the Penal Law was constitutional (Sentence: A47). The court then sentenced appellant to the promised prison sentence of from one to three years (Sentence: A48).

On appeal to the Appellate Division of the New York Supreme Court, appellant claimed that Section 70.02(5) of the Penal Law denied him due process of law for three reasons. First, he argued that the statute improperly prevents persons indicted for an armed felony offense from receiving a negotiated sentence of less than from one to three years, unless specified mitigating factors exist. Second, he contended that the statute creates an unconstitutional presumption of guilt and

improperly shifts to a defendant the burden of exonerating himself. Third, appellant asserted that the statute unconstitutionally precludes the court from considering a defendant's background in imposing sentence. The Appellate Division affirmed the conviction. People v. Felix, 87 A.D.2d 529 (1st Dept.), leave to appeal granted, 56 N.Y.2d 656 (1982) (A15-39).

On appeal to the New York Court of Appeals, appellant repeated his challenge to the constitutionality of the statute. That Court, with one judge dissenting, held that Penal Law Section 70.02(5) did not violate either the State or the Federal constitution. People v. Felix, 58 N.Y.2d 156 (1983) (A1-14).

ARGUMENT

THERE IS NO SUBSTANTIAL FEDERAL QUESTION THAT THE NEW YORK LEGISLATURE HAS THE AUTHORITY TO ENACT A SCHEME LIMITING THE PLEA AND SENTENCING BARGAINING AVAILABLE TO DEFENDANTS INDICTED FOR ARMED FELONIES.

In his jurisdictional statement, appellant asserts that Section 70.02(5) of the New York Penal Law deprived him of his Fourteenth Amendment right to due process of law for several reasons. First, he claims that the New York Legislature has no power to restrict what he calls the "ordinary sentencing discretion of the court" (JS: 9), even when the plea and sentence are negotiated by defendants indicted for armed violent felony offenses. Second, appellant asserts that the statute creates a "mandatory presumption" of a defendant's guilt of an armed felony, and shifts to him the burden of disproving his guilt. Finally, he argues that there are insufficient procedural safeguards at the

hearing at which it is determined whether a defendant should be given a more lenient sentence because of mitigating circumstances (JS: 16). As will be demonstrated, appellant has failed to raise any substantial federal question which merits review by this Court.

A. The New York Legislature did not violate due process by exercising its traditional power to enact a scheme limiting the sentencing alternatives available to defendants who are indicted for armed felonies but are permitted to enter negotiated guilty pleas to lesser crimes.

Concerned with the problem of violent crime and the overly lenient treatment of violent criminals, the New York Legislature enacted a unified package of legislation aimed at limiting the alternatives open to defendants in a plea-bargaining situation. First, it limited the crime to which a defendant charged with an armed violent felony could plead: no plea lower than than a class D violent felony could be accepted. Second, it limited the sentence available to such a plea-bargaining defendant: absent specified ameliorating factors bearing upon the way the crime was committed, the defendant must receive a prison term of at least one to three years.

It is beyond dispute that a legislature has the power to restrict plea bargaining, or even to eliminate it altogether. Santobello v. New York, 404 U.S. 257, 262 (1971). Perhaps recognizing this, appellant does not challenge the Legislature's decision to limit the degree of the crime to which a defendant can plead. Nonetheless, he does challenge the Legislature's decision to

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*See Hechtman, 1978 Practice Commentary to Penal Law §70.02 (McKinney Supp. 1982); Bellacosa, 1978 Supplementary Practice Commentary to CPL §220.10 (McKinney Supp. 1981).

limit the nature of the sentence imposed as a result of plea-bargaining. His claim that the Legislature cannot restrict sentencing discretion by limiting the factors to be considered in mitigation is totally without support and raises no substantial federal question.

Plainly, a legislature has the power to define the punishment applicable to each non-capital crime, even by choosing to make sentencing totally mandatory. As this Court discussed in United States v. Grayson, 438 U.S. 41, 45-47 (1978), no one penological model is mandated by the Constitution. In the past, judges had no discretion at all: each crime had its specific punishment, and courts could not consider a defendant's background in imposing sentence. Id. at 45-46. More recently, the prevailing philosophy has been the rehabilitative model, in which legislatures permitted judges to consider a broad, almost unlimited variety of factors in determining what sentence was appropriate. Id. at 46-49. True, as appellant notes, when a sentencing statute mandates that a judge consider a broad range of factors before imposing sentence, it is an abuse of discretion for the judge not to do so. See, e.g., Dorszynski v. United States, 418 U.S. 424 (1974); United States v. Harris, 558 F. 2d 366, 372 (7th Cir. 1977); United States v. Bowser, 497 F.2d 1017 (4th Cir.), cert. denied, 423 U.S. 997 (1975). However, those precedents plainly do not prevent the Legislature from restricting the range of discretion given a sentencing judge in the first instance.

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*See Hechtman, 1978 Practice Commentary to Penal Law §70.02 (McKinney Supp. 1982); Bellacosa, 1978 Supplementary Practice Commentary to CPL §220.10 (McKinney Supp. 1981).

Since a legislature is empowered to give a judge total discretion in sentencing, or no discretion at all, it may certainly take a middle course and give him some discretion. That is exactly what the New York Legislature did in enacting Penal Law Section 70.02(5). It permitted the sentencing judge to consider the usual broad range of factors, including a plea-bargaining defendant's background, in determining the length of the prison term he is to receive. At the same time, however, the Legislature mandated that only certain specified factors dealing with the nature of the crime be considered in determining whether a defendant receives less than a one to three year term.

No federal case has ever adopted appellant's unprecedented argument that legislatures do not have the power to limit judicial discretion in sentencing in this way. Indeed, this Court has suggested that the reign of the "rehabilitative" unlimited judicial discretion model may soon be over. United States v. DiFrancesco, 449 U.S. 117, 143 (1980); United States v. Grayson, 438 U.S. at 47, fns. 6 and 7; see also Schulhofer, Due Process of Sentencing, 128 U. Pa. L. Rev. 733, 734, 737 (1980). Thus, no substantial federal question is raised by appellant's attempt to constitutionalize current penological policy on an issue that has traditionally been within the aegis of the legislative branch of government.

Nor is a substantial federal question raised by appellant's claim that consideration of "unsustained charges in the indictment" constitutes reliance on "misinformation of constitutional magnitude." In the first place, Penal Law Section 70.02(5) does not make the

sentence imposed on a plea-bargaining defendant depend "solely" on the crime initially charged, as appellant argues. Cf. Drayton v. People of the State of New York, 556 F.2d 644, 646-47 (2d Cir.) cert. denied, 434 U.S. 958 (1977). Rather, a judge may consider a broad variety of factors, including the defendant's background and prior criminal conduct, in deciding whether to impose the maximum prison term of two and one-third to seven years or the minimum of one to three years. And, such a defendant is not even precluded from the lower range of sentences, such as probation. The statute vests the sentencing judge with discretion to impose the lesser sentence when any one of three mitigating factors exist. People v. Felix, 58 N.Y.2d at 163.

Of course, as appellant points out, an indictment alone cannot constitute proof during the guilt-determining process. Tot v. United States, 319 U.S. 463, 466 (1943). However, Penal Law Section 70.02(5) deals with the sentencing, and not the guilt-determining, phase of a criminal case. No federal case has held that charges in an indictment constitute the type of "misinformation of constitutional magnitude"* that a sentencing judge is forbidden to consider. Just the opposite is true. Federal cases have uniformly held that information about crimes initially charged in an indictment but dismissed when a defendant pleads guilty

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*See United States v. Tucker, 404 U.S. 443, 446 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948); Roberts v. United States, 445 U.S. 552, 556-57 (1980).

may be considered by the sentencing judge.* Indeed, sentencing judges may consider criminal conduct which did not result in a conviction, crimes for which a defendant was never charged, and even facts relating to charges on which the defendant was acquitted.**

Judicial consideration of the "real offense" in sentencing is particularly appropriate in the plea bargaining situation, since the crime to which a defendant ultimately pleads guilty may bear no relationship to the crime he has actually committed. Indeed, a defendant may plead guilty without admitting the facts of the crime to which he offers to plead, North Carolina v. Alford, 400 U.S. 25, 37 (1970), may plead guilty to a hypothetical crime, People v. Griffin, 7 N.Y. 2d 511 (1966), or may admit facts making out another crime. That is precisely what happened here: appellant pleaded guilty to Attempted Robbery in the Second Degree, which contemplates the use of an imitation pistol, but admitted facts making out Robbery in the First Degree, which contemplates the use of a knife. As the Second Circuit has said, to argue that the Constitution is

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**See, e.g., Billiteri v. United States Bd. of Parole, 541 F. 2d 938, 944-45 (2d Cir. 1976); Bistram v. United States Parole Bd., 535 F.2d 329, 330 (5th Cir. 1976); United States v. Needles, 472 F. 2d 652 (2d Cir. 1973); Menechino v. Oswald, 430 F. 2d 403, 407-08 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971); United States v. Doyle, 348 F. 2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965).

**Williams v. New York, 337 U.S. 241, 244 (1949) and United States v. Cifarelli, 401 F. 2d 512 (2d Cir.), cert. denied, 393 U.S. 987 (1968) (criminal conduct which did not result in a conviction); United States v. Grayson, 438 U.S. at 53-54 and United States v. Hendrix, 505 F. 2d 1233, 1235 (2d Cir. 1974), cert. denied, 423 U.S. 897 (1975) (crimes for which defendant was never charged); Townsend v. Burke, 334 U.S. at 740-41 and United States v. Sweig, 454 F. 2d 181 (2d Cir. 1972) (other charges on which the defendant was acquitted).

affronted by considering unproved criminal activity while determining sentence in a plea bargaining situation such as this one, is as implausible as taking the double jeopardy clause to bar reference to past convictions. United States v. Doyle, 348 F.2d at 721; see Schulhofer, supra, at 763. Indeed, if it is within the ordinary discretion of the judge to consider unsustained charges in the indictment in deciding on an appropriate sentence, the Legislature certainly has the authority to mandate that a sentencing judge consider this factor.

It was well within the Legislature's power to restrict plea and sentence bargaining for defendants charged with armed violent felonies. Nor is any substantial federal question raised by a sentencing court's consideration of the nature of the crime originally charged in the indictment.

B. The procedure set forth in New York Penal Law Section 70.02(5)(c) is consistent with the requirements of procedural due process.

It is beyond cavil that the concept of due process is flexible, and its procedural requirements vary with different situations. See, e.g., Gardner v. Florida, 430 U.S. 349, 358 fn. 9 (1977); Wolff v. McDonnell, 418 U.S. 539, 560-61 (1974); Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In particular, this Court has recognized that "the due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." Williams v. New York, 337 U.S. at 251.

Appellant, however, attempts to do just that. Relying on Specht v. Patterson, 386 U.S. 605 (1967), appellant argues that Penal Law Section 70.02(5)(c)

subjects a defendant to "enhanced punishment" based upon "facts not established by the conviction," and that he is therefore entitled to most of the due process rights applicable at trial. This argument has consistently been rejected by the federal courts, and need not be considered again.

Specht involved a defendant convicted under a Colorado indecent liberties statute under which the maximum sentence that could be imposed was ten years. Without holding a hearing, the trial court used that conviction as a basis for sentencing Specht under the Sex Offenders Act, a separate statute, under which the maximum sentence that could be imposed was life imprisonment. This Court held that due process required that defendant have the right to be present with counsel, to confront and cross-examine witnesses, and to present evidence on his own behalf before the court could, on the basis of the previously uncharged crime which the Sex Offenders Act involved, impose a sentence heavier than that permitted for the crime of which he stood convicted. 386 U.S. at 610; see Schulhofer, supra at 762.

In the first place, no defendant is subject to "enhanced punishment" after a post-plea hearing pursuant to Penal Law Section 70.02(5)(c). Rather, any new facts found at that hearing can serve only to reduce, not to enhance, the punishment which a defendant was told he would receive at the time he entered his guilty plea. And, in contrast to Specht, Penal Law Section 70.02(5)(c) involves no separate statute and no new criminal charge. What is at issue is not a defendant's guilt of a new and previously uncharged crime, but only the degree of punishment to be imposed on him for the crime of which he

was already convicted. See Williams v. New York, 337 U.S. at 247.

In any event, a sentencing inquiry into facts not brought out at a trial or plea colloquy is simply not tantamount to a "new criminal charge" against a defendant. This is true even if a defendant is subject to enhanced punishment after the inquiry, as are defendants who are sentenced as repeat offenders,* and defendants found to be "dangerous special offenders" under the Federal Organized Crime Control Act of 1970.** 18 U.S.C. §3575(e)(West Supp. 1983). Indeed, by definition, inquiry into a defendant's background involves consideration of facts not established by the conviction. Yet this Court has specifically rejected appellant's claim that such an inquiry requires freezing the evidential procedure of sentencing in the mold of trial procedure. Williams v. New York, 337 U.S. at 251. Therefore, appellant's argument that he was entitled to trial-like procedures at sentencing raises no substantial federal question.

Furthermore, unlike the statute involved in Specht, Penal Law Section 70.02(5)(c) gives a defendant

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*See, e.g., Oyler v. Boles, 368 U.S. 448, 451-52 (1962); Chandler v. Fretag, 348 U.S. 3, 8 (1954); Graham v. West Virginia, 224 U.S. 616, 624-25 (1912).

**See e.g. United States v. Stewart, 531 F. 2d 326, 332 (6th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Inendino, 604 F. 2d 458, 463 (7th Cir.), cert. denied, 444 U.S. 932 (1979); United States v. Ilacqua, 562 F.2d 399, 403 fn. 7, 405 (6th Cir. 1977), cert. denied, 435 U.S. 906 (1978); United States v. Williamson, 567 F.2d 610, 614-15 (4th Cir. 1977); United States v. Holt, 397 F. Supp. 1397 (N.D. Tex. 1975), aff'd in part rev'd in part on other grounds, 537 F. 2d 845 (1976), cert. denied sub nom Hartstrom v. United States, 429 U.S. 1051 (1977). See also, United States v. DiFrancesco, supra; United States v. Fatico, 603 F.2d 1053, 1057 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980); Hollis v. Smith, 571 F.2d 685, 694-95 (2d Cir. 1978).

the right at a hearing to deny or explain the information concerning the original charge in the indictment. Gardner v. Florida, 436 U.S. at 355-56; Williams v. New York, 337 U.S. at 244. He is specifically permitted to present relevant information to the sentencing judge, and of course he is entitled to the assistance of counsel at the inquiry. Nor is there any indication that he would not be able to confront and cross-examine witnesses against him, or call his own witnesses at the hearing, as may defendants being sentenced as dangerous special offenders under 18 U.S.C. §3575(b).

And, contrary to appellant's claim, the statute does not place on him the burden of proving that he did not commit the crimes with which he was originally charged. First, appellant erroneously bases his argument on precedents dealing with presumptions which shift the burden of proof to a defendant during the guilt-determining process. County Court of Ulster County v. Allen, 442 U.S. 140 (1979); Mullaney v. Wilbur, 421 U.S. 684 (1975); Leary v. United States, 395 U.S.6 (1969); Tot v. United States, supra. Again, appellant misses the point by equating the guilt-determining with the sentencing process. What is involved here is the determination of the appropriate sentence for a crime of which appellant has already been convicted.

In any event, the statute does not specify a burden of proof at all, but explicitly gives both the prosecutor and the defendant a chance to present any relevant information to the court. A sentencing judge is as likely to get his information about the way the actual crime was committed from the prosecution or the pre-sentence report as from a defendant. Due process is

hardly offended by the probability that in some cases establishment of a mitigating factor will require that a defendant come forward with proof. People v. Felix, 58 N.Y.2d at 166-67.*

Indeed, in every case arising under this statute, the People have already gone forward in the grand jury with evidence legally sufficient to prove that a defendant committed an armed violent felony. The People in appellant's case were also ready to proceed to trial on all counts. Appellant could have had a public trial where he could put the People to their proof beyond a reasonable doubt. It was he, on the advice of counsel, who avoided airing of the facts by negotiating the bargain by which he was permitted to plead guilty to a lesser crime. He voluntarily chose to accept that advantageous bargain, and a far more lenient sentence than would be required if he were convicted of the top charge at trial. Having made that choice, he cannot now argue that due process mandates still further leniency or requires at the sentencing all the rights he chose to forego when he waived his right to trial.

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In sum, appellant's arguments fly in the face of established federal law and do not merit consideration by this Court. All previous law on the subject supports

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*Indeed, it has consistently been held in the federal courts that the dangerous special offender statute, which places the burden of proof on the government by a preponderance of the evidence, actually provides "far more due process protection for the convicted offender at his hearing on increased sentence than is required." United States v. Stewart, supra; United States v. Inendino, supra; United States v. Ilacqua, supra; United States v. Williamson, supra; United States v. Holt, supra.

the conclusion that a legislature has the power to set sentencing guidelines for judges, and that a sentencing judge may consider the crime for which a defendant was indicted in deciding what sentence to impose. The procedure set down in Penal Law Section 70.02(5) is similar to that in other statutes which have been found to satisfy the requirements of due process. There is no reason for this Court to disturb this well-settled area of law by considering this appeal.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

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